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No. 01-

IN THE

Supreme Court of the United States

DILLARD DEPARTMENT STORES, INC.,
Petitioner,

v.

PAULA DARLENE HAMPTON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in concluding that a 5-minute security stop, based upon probable cause, which occurred while Plaintiff was seeking to redeem a fragrance coupon of "negligible" value, violated the "make and enforce contracts" provision of 42 U.S.C. § 1981 and justified a compensatory and punitive award of $1.15 million.

LIST OF PARTIES AND AFFILIATES

In addition to the parties listed in the caption, Plaintiff Demetria Cooper was also a party to the proceedings below.

Petitioner's official name is not Dillard's Department Stores, Inc. but rather Dillard's Inc. Pursuant to Rule 29.6 of the Rules of this Court, Dillard's Inc. states that it has no parent company, and no publicly held company owns more than 10% of the stock of Dillard's Inc.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Dillard Department Stores, Inc. ("Dillard's") respectfully requests that this Court grant its petition for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is published at 247 F.3d 1091 (10th Cir. 2001) and is reproduced in the Appendix to this Petition ("Pet. App.") at 1a to 47a. The court of appeals' denial of rehearing and rehearing en banc is unpublished. Pet. App. 97a-98a. The opinion of the United States District Court for the District of Kansas granting Dillard's partial summary judgment is published at 985 F. Supp. 1055 (D. Kan. 1997). Pet. App. 86a-96a. The district court's opinion denying Dillard's

motion for judgment as a matter of law is published at 18 F. Supp. 2d 1256 (D. Kan. 1998). Pet. App. 48a-85a.

JURISDICTION

The court of appeals entered its decision on April 24, 2001. A timely petition for rehearing and rehearing en banc was denied on September 4, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Title 42, Section 1981 provides:

> (a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981.

STATEMENT OF THE CASE

This case involves a $1.15 million verdict against Dillard's arising from a brief investigative stop of an African-American customer by a Dillard's security guard. The stop was supported by probable cause, lasted no more than five minutes and was limited to comparing the contents of the Dillard's shopping bag that Plaintiff was carrying against the items on her store receipt. More to the point, the investigative stop did not prevent Plaintiff from completing her transaction with Dillard's, which she unilaterally abandoned because it "'wasn't a concern to her.'" Pet. App. 90a.

The court of appeals, however, concluded that Dillard's could be held liable for compensatory and punitive damages under the "make and enforce contracts" provision of 42 U.S.C. § 1981 ("Section 1981"). This remarkable holding derived from the seemingly inconsequential fact that the investigative stop occurred while Plaintiff was redeeming a fragrance coupon of nominal value. The panel majority acknowledged that if the stop had occurred only moments later, after Plaintiff had redeemed a fragrance sample, then there could be no liability under Section 1981. The panel concluded, however, that the brief delay occasioned by the investigative stop, the timing of which it characterized as "purely fortuitous," was legally sufficient to support liability under Section 1981.

The court of appeals' decision presents, in stark relief, an important issue regarding the proper scope of the "make and enforce contracts" provision of Section 1981 upon which the federal courts of appeals have adopted conflicting legal standards. In the Seventh, Fifth and Eighth Circuits, Plaintiff could not have prevailed because those courts have explained that the right to "make and enforce contracts" is violated only if the alleged conduct results in the "actual loss of a contract interest." Here, Plaintiff suffered no loss of any contractual interest. After the stop, Plaintiff had precisely the same

contractual right to redeem her fragrance coupon as she did before the stop. Her efforts to redeem the coupon, at most, were delayed for the duration of this brief stop.

In contrast, and in addition to the decision below, the Third and Sixth Circuits have adopted a more expansive view of the "make and enforce contracts" provision of Section 1981 that permits recovery even where, as here, a plaintiff has not been denied service, denied admittance or required to leave the store. The decision below thus squarely presents a mature conflict regarding the recurring issue of the proper legal bounds of the "make and enforce contracts" provision of Section 1981.

The Court should grant certiorari to resolve this decisional conflict.

A. Statutory Background.

Title 42, Section 1981 is a civil rights statute whose continuing evolution this Court has traced "on more than one occasion." *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 384 (1982). Section 1981 originated in § 1 of the Civil Rights Act of 1866, ch. 31, 14 Stat. 27, which was enacted by Congress shortly after ratification of the Thirteenth Amendment. *General Bldg. Contractors*, 458 U.S. at 384. Following ratification of the Fourteenth Amendment, Congress passed the Enforcement Act of 1870, ch. 114, 16 Stat. 140, which, at § 16, contained essentially the same language currently reflected in Section 1981(a). 458 U.S. at 385. That provision provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a).

This Court repeatedly has been called upon to resolve disputes regarding the legal scope of Section 1981, and this case presents the next logical step in the sequence. Initially, more than 100 years ago, this Court explained that the rights protected by Section 1981 were intended solely "to counteract

and furnish redress against State laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified." *The Civil Rights Cases*, 109 U.S. 3, 16 (1883). Under this early view, Section 1981 could not "be impaired by the wrongful acts of individuals, unsupported by State authority." *Id.* at 17. Subsequently, the Court reversed course, concluding that Section 1981 "prohibits racial discrimination in the making and enforcement of *private* contracts." *Runyon* v. *McCrary*, 427 U.S. 160, 168 (1976) (emphasis added).

The Court, however, also has made clear that the scope of Section 1981 is not wholly unbounded and is subject to important legal limits. Thus, the Court has explained that Section 1981 is not violated by conduct that has a disproportionate impact on a particular group but "only by purposeful discrimination." *General Bldg. Contractors*, 458 U.S. at 391. Similarly, in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), the Court ruled that Section 1981 was not "a general proscription of racial discrimination in all aspects of contract relations," but instead "prohibit[ed] discrimination only in the making and enforcement of contracts." *Id.* at 176.

Against this background, and, in particular, in light of the Court's decision in *Patterson*, Congress amended Section 1981 through enactment of the Civil Rights Act of 1991. Pub. L. No. 102-166, 105 Stat. 1071. Congress redesignated the pre-existing language of Section 1981 as subsection (a), and added subsections (b) and (c). Subsection (b) defines "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id.* § 101, 105 Stat. at 1072. Subsection (c), in turn, provides that the "rights protected by [Section 1981] are protected against impairment by nongovernmental discrimination." *Id.* This Court has explained that the 1991 amendments establish a "new standard of conduct" for claims under Section 1981. *Rivers* v.

Roadway Express, Inc., 511 U.S. 298, 304 (1994). The *Rivers* Court, however, had no occasion to determine the outer bounds of Section 1981 because it held that the 1991 Amendments applied prospectively only. *Id.*

This case presents the recurring issue of the proper scope of this "new standard of conduct" under Section 1981 with respect to the relationship between a retail business and its customers.

B. District Court Proceedings.

1. This cases arises from a shopping trip involving Plaintiff Paula Darlene Hampton ("Plaintiff" or "Hampton") and her niece Demetria Cooper, both of whom are African-American. On April 5, 1996, Hampton and Cooper, together with four children, were shopping at the children's department at a Dillard's store in Overland Park, Kansas. Pet. App. 3a. Hampton had shopped at Dillard's numerous times without incident. *Id.* at 47a. On this occasion, however, a plain-clothed Dillard's security guard, Tom Wilson, observed that Cooper appeared to be looking around "as if to check to see if she was being watched" and noticed that she had a rolled-up cloth item in her hand. *Id.* at 4a. Wilson asked another employee, Pam Fitzgerel, to monitor Hampton and Cooper while they were trying clothes on Cooper's infant son. *Id.* Fitzgerel saw that Cooper had a rolled-up cloth item under her jacket and reported this to Wilson, stating she was "positive" of what she had seen. *Id.*

Hampton left the fitting room and purchased clothing for Cooper's son. Pet. App. 4a. The cashier gave both Hampton and Cooper coupons for men's cologne samples redeemable at no cost at the fragrance counter. *Id.*; see also *id.* at 89a. Hampton and Cooper proceeded to the fragrance counter, which was located at the exit where the Dillard's store opens into a shopping mall. *Id.* at 4a.

Wilson approached the group and told Hampton that Cooper had been "observed placing something in her coat."

Pet. App. 4a. Wilson asked to look inside the Dillard's shopping bag that Hampton was carrying, he checked the items in the shopping bag against her receipt, and determined that the items matched. *Id.* at 4a-5a. As the district court explained, Wilson never touched Hampton, never used any racial epithets or made any derogatory remarks to or about her or Cooper. *Id.* at 89a. Nevertheless, during the encounter, Hampton became upset and said that she did not appreciate being accused of shoplifting. *Id.* at 5a. Hampton asked for Wilson's name and the location of the customer service counter. *Id.* She then proceeded directly to the customer service counter. The entire encounter between Wilson and Hampton lasted no more than five minutes. *Id.*

2. After the incident, Hampton and Cooper filed suit, alleging violations of Section 1981 and a tort claim for false imprisonment under Kansas law. The district court granted, in part, Dillard's motion for summary judgment, rejecting Plaintiffs' argument that "freedom from racially discriminatory security practices is a benefit or privilege of a merchant's implied contractual offer to let them shop in its store." Pet. App. 92a. The court reasoned that Plaintiffs' theory, if accepted, "'would come close to nullifying the contract requirement of section 1981 altogether, thereby transforming the statute into a general cause of action for race discrimination in all contexts.'" *Id.* (quoting *Lewis* v. *J.C. Penney Co.*, 948 F. Supp. 367, 371-72 (D. Del. 1996)).

As to the state law count, the court concluded that Wilson had probable cause to detain the women and did so in a reasonable manner. Pet. App. 95a-96a.[1] The court explained

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[1] The court thus held that Dillard's was entitled to summary judgment on this claim under the statutory defense for merchants contained in Kansas Statutes Annotated Section 21-3424, which provides:

> Any merchant, or merchant's agent or employee, who has probable cause to believe that a person has actual possession of and has wrongfully taken, or is about to wrongfully take merchandise from a mercantile establishment, may detain such person on the premises or

that on the issue of probable cause there was no evidence that "seriously calls into question either Wilson's credibility or that of Fitzgerel—who independently observed Cooper in the fitting room." *Id.* at 96a.

The district court, however, allowed Hampton's Section 1981 claim to go forward because Hampton had received a coupon for a fragrance sample at the time of her purchase and was approached by the security guard while she was attempting to redeem the coupon. Pet. App. 93a-94a. At trial, the jury determined that the fragrance sample was a "benefit" of the contractual relationship between Hampton and Dillard's and that Dillard's had interfered with her redemption of the coupon based upon the encounter between Wilson and Hampton. Thereafter, the jury was asked whether Hampton's race was a "motivating factor in defendant's conduct," that is, whether "defendant acted, at least in part, because of plaintiff's race." *Id.* at 25a. "[D]efendant's conduct," in turn, was described as "defendant's surveillance, detention and search of [Hampton's] belongings." *Id.* at 24a, 25a.

The undisputed evidence at trial reflected that Hampton was never required to leave the store, was never denied service and was not prevented from redeeming her fragrance coupon. Pet. App. 5a, 89a. Indeed, after the encounter with Wilson, Hampton returned to get the name and telephone number of the employee working at the fragrance counter, but did not attempt to redeem the fragrance coupon because "'it wasn't a concern to her.'" *Id.* at 90a. That was not surprising because "the value of the free cologne sample was negligible." *Id.* at 81a.

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in the immediate vicinity thereof, in a reasonable manner and for a reasonable period of time for the purpose of investigating the circumstances of such possession.

Kan. Stat. Ann. § 21-3424(c).

Nevertheless, the jury returned a verdict of $56,000 in compensatory damages and $1.1 million in punitive damages. On Dillard's motion for a new trial, the district court concluded that the compensatory award was justified not by the loss of the coupon but by the emotional injury of being falsely accused of shoplifting. Similarly, the district court sustained the punitive award, reasoning that the case did not involve "mere economic damages" but "personal injury and emotional damages." Pet. App. 85a.

C. The Court Of Appeals' Decision.

A divided panel of the Tenth Circuit affirmed, with Senior Judge Anderson dissenting. The court ruled that there was sufficient evidence for a jury to conclude that Dillard's violated the "make and enforce contracts" provision of Section 1981 based upon Wilson's security stop, which occurred while Hampton was seeking to redeem her fragrance sample. Pet. App. 16a. The panel majority agreed with the dissent that the timing of Wilson's interruption of Hampton as she was redeeming the fragrance coupon was "'purely fortuitous.'" *Id.* at 16a n.3. This was because "Wilson's testimony d[id] not suggest he had the subjective intent to prevent the redemption of the coupon." *Id.* at 16a & n.3. According to the panel majority, however, "Wilson's inopportune timing neither alters the resulting interruption of an ongoing transaction nor defeats this § 1981 action." *Id.* at 16a n.3. To support this conclusion, the court responded that "§ 1981 protects enjoyment of the benefits of a contract from *any* impairment." *Id.* at 16a-17a. The majority ruled that subjective intent to interfere with the making or enforcement of a contract was not required to establish a Section 1981 violation. *Id.* Rather, the court interpreted Section 1981 to require only a general intent "to discriminate on the basis of race" where "that discrimination interfered with the making or enforcing of a contract." *Id.* at 17a.

Finally, the majority affirmed the compensatory and punitive awards. It acknowledged that "any economic

damage that resulted from the store's intentional interference with the redemption of the fragrance sample was negligible." Pet. App. 32a. Even though Section 1981, by its terms, applies only to conduct that purposefully prevents the making or enforcing of a contract, the court of appeals upheld the compensatory award based upon Hampton's testimony regarding her emotional suffering caused by being accused of shoplifting in front of her family. *Id.* at 32a-33a. The court also affirmed the $1.1 million punitive award on the basis of the testimony not about Dillard's denial of the right to "make and enforce contracts," but instead upon testimony regarding Dillard's training of its security staff, its surveillance policies, reports regarding observations of African-American customers and Dillard's arrest reports. *Id.* at 34a, 35a.

In dissent, Senior Judge Anderson emphasized that there was no evidence that Dillard's sought to interfere with Hampton's contract because "[n]othing in Ms. Hampton's or Ms. Cooper's testimony remotely suggests that Mr. Wilson's conduct towards them indicated an intention to prevent either plaintiff from redeeming the fragrance coupons." Pet. App. 45a. Judge Anderson explained that the evidence reflected that, at most, any interference with "Ms. Hampton's redemption of her fragrance coupon was *purely fortuitous*." *Id.* (emphasis added). The dissent further explained that there was no evidence that "either Mr. Wilson's or plaintiffs' conduct, or Ms. Hampton's damages . . . would have been different in any way had Ms. Hampton already received her fragrance sample." *Id.* at 46a. Specifically, Judge Anderson explained that "all the evidence indicates that it was the wrongful accusation of shoplifting, not the denial of her free fragrance sample, which caused Ms. Hampton's alleged injuries." *Id.* Judge Anderson emphasized, however, that Section 1981 "does not provide a remedy for the wrongful accusation of shoplifting, absent some interference with a contract benefit." *Id.*

Dillard's petitioned for rehearing and rehearing en banc. The same panel majority voted to deny rehearing, while Senior Judge Anderson would have granted the petition. Pet. App. 97a. A majority of the active judges of the court of appeals denied the petition for rehearing en banc. See 10th Cir. R. 35.5. Chief Judge Tacha, Judge Kelly, and Judge Brorby voted to grant rehearing en banc. Pet. App. 97a.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the court of appeals' decision poses an important issue regarding the legal scope of the "make and enforce contracts" provision of Section 1981 that has generated conflicting positions among the courts of appeals. That issue presents a recurring and outcome determinative question in cases filed throughout the country in which plaintiffs have sought relief based on allegations that the services that they received from retailers were inferior in some way to the services allegedly afforded to white customers. This case squarely presents that conflict. Although the court below concluded that even a brief delay occasioned by an investigative stop was sufficient to support relief, Plaintiff could not have prevailed under the legal standards adopted by the courts of appeals in other circuits that employ more demanding rules for determining whether there was been a denial of a contractual right that would support liability under Section 1981. The case thus warrants review so the Court can resolve this conflict and provide one uniform nationwide standard to govern claims under the "make and enforce contracts" provision of Section 1981.

There is a profound conflict among the circuits regarding the legal standards for determining whether conduct violates the "make and enforce contracts" provision of Section 1981. On the one hand, the courts of appeals for the Seventh, Fifth and Eighth Circuits employ a bright-line standard that requires plaintiffs to establish that they suffered an "actual loss of a contractual interest," which, in the retail context,

requires that they prove that they were denied admittance, denied service, or required to leave the store. This approach, in turn, has been adopted by numerous district courts throughout the country. In contrast, the Third and Sixth Circuits, as well as the court of appeals in this case, have employed a far more lenient standard that authorizes recovery under Section 1981 even when a plaintiff has not been denied service, but instead has alleged that there was a delay in receiving service or that the service actually received was inferior or in some way different from that received by white customers. Those decisions too have been adopted by a number of district courts that have embraced this more expansive view of Section 1981.

This case squarely presents this conflict for resolution because under the standards adopted by the Seventh, Fifth and Eighth Circuits, Plaintiff could not have prevailed under Section 1981 based upon the brief delay associated with the investigative stop in this case. Simply put, Plaintiff's contractual right to redeem her fragrance coupon was precisely the same after the stop as it was before. The court of appeals' efforts to reconcile its holding with that of conflicting court of appeals' decisions simply do not withstand scrutiny because, at bottom, Plaintiff could not have recovered under Section 1981 if her case had been filed in the Seventh, Fifth or Eighth Circuits because her contractual rights both before and after the security stop were the same.

There can be no question that proper resolution of this conflict regarding the meaning of one of the nation's oldest civil rights statutes is an issue of surpassing importance. For over 100 years, the Court has resolved conflicts regarding the proper scope of Section 1981. Adoption of one uniform national standard is necessary to ensure that consumers will know the scope of their rights under Section 1981. Conversely, a uniform standard will alleviate unnecessary uncertainty and allow retailers better to assess the scope of their obligations so that they can establish company-wide

protocols that are not subject to differing standards depending upon the location of the specific store in question. Liability under Section 1981 should be governed by substance, not geography. Finally, resolution of the proper scope of Section 1981 is important to securing a proper balance between State and federal law with respect to the obligations owed by retailers to their customers.

ARGUMENT

THE DECISION BELOW PRESENTS A CONFLICT AMONG THE COURTS OF APPEALS AS TO THE PROPER SCOPE OF THE "MAKE AND ENFORCE CONTRACTS" PROVISION OF 42 U.S.C. § 1981, AN ISSUE OF SURPASSING NATIONAL IMPORTANCE.

A. The Courts Of Appeals Have Adopted Conflicting Standards For Assessing Whether Conduct Violates The "Make And Enforce Contracts" Provision Of Section 1981.

1. At least three courts of appeals have adopted a bright-line standard for determining whether conduct violates the "make and enforce contracts" provision of Section 1981. Under those standards, Plaintiff could not have prevailed under Section 1981 because she failed to establish that the conduct about which she complained resulted in the "actual loss of a contract interest."

In the Seventh Circuit, to state a cause of action under Section 1981 in a retail setting, a customer categorically must show that he was "denied . . . admittance" or "service," or required "to leave the store." *Morris* v. *Office Max, Inc.*, 89 F.3d 411, 414 (7th Cir. 1996). In *Morris*, the customers argued that the store discouraged or dissuaded them from purchasing time stamps by calling uniformed police officers to stop them and ask them questions in the store. *Id.* The *Morris* Court explained that plaintiffs failed to state a

violation of Section 1981 because they were not denied admittance or service or required to leave the store. *Id.* The Seventh Circuit ruled that a cause of action under Section 1981 must allege and establish "the actual loss of a contract interest, not merely the possible loss of future contract opportunities." *Id.* at 414-15.

Similarly, in *Bagley* v. *Ameritech Corp.*, 220 F.3d 518 (7th Cir. 2000), the Seventh Circuit held that even where a customer is refused service by one employee, that is not a basis for a Section 1981 action if the customer could have been served by other employees. *Id.* at 522. Although one employee had been outwardly hostile to Bagley and had refused to wait on him, the Court concluded that there had been no Section 1981 violation because the evidence reflected that defendant nevertheless "would have sold Bagley a phone." *Id.* The court of appeals reasoned that because Bagley cut off his opportunity to make the purchase by leaving the store, the defendant had not denied him the right to make and enforce contracts under Section 1981. *Id.* at 521-22.

In *Bellows* v. *Amoco Oil Co.*, 118 F.3d 268 (5th Cir. 1997), the Fifth Circuit held that a violation of Section 1981 requires a plaintiff to show that the defendant's conduct had "modified, changed or terminated" the contractual relationship. *Id.* at 275. Applying that standard and relying upon the Seventh Circuit's decision in *Morris*, the court of appeals reversed a jury verdict against defendant because the evidence was inadequate to prove that defendant "did in fact interfere with the contract." *Id.* (emphasis omitted). Specifically, the Fifth Circuit held that Section 1981 had not been violated because plaintiff failed to demonstrate how its contractual rights were "in any way changed, modified, altered, terminated, or otherwise affected by any of [defendant's] actions." *Id.* at 275.

Finally, and most recently, the Eighth Circuit's decision in *Youngblood* v. *Hy-Vee Food Stores, Inc.*, 266 F.3d 851 (8th

Cir. 2001), also reflects similar principles. There, the court of appeals affirmed the grant of summary judgment, holding that there was no Section 1981 liability where a customer was stopped for shoplifting after making a purchase and his purchase was confiscated by the store. *Id.* at 853. The court explained that "Section 1981 does not provide a general cause of action for race discrimination if in fact it occurred," rather, "a plaintiff must point to some contractual relationship in order to bring a claim under Section 1981." *Id.* at 855. Because the customer had completed his purchase and received the merchandise from the clerk, the Eighth Circuit reasoned that "neither party owed the other any duty under the retail-sale contract," and therefore there could be no liability under Section 1981. *Id.* at 854.

District courts outside these circuits also have applied standards consistent with those adopted by the Seventh, Fifth and Eighth Circuits. Thus, in *Garrett* v. *Tandy Corp.*, 142 F. Supp. 2d 117 (D. Me. 2001), the court explained that the proper focus in Section 1981 was on "restrictions on the ability to contract . . . not general mistreatment related to race," and therefore Section 1981 "require[d] that a complaint 'allege the actual loss of a contract interest.'" *Id.* at 119 & n.3 (quoting *Morris*, 89 F.3d at 414-15).[2] Further, district courts have rejected Section 1981 claims predicated upon allegations "of delayed service" because such allegations "do not rise to the level of interference with a contract sufficient to grant relief under § 1981." *Jeffrey* v. *Home Depot U.S.A., Inc.*, 90

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[2] *See also Rogers* v. *Elliott*, 135 F. Supp. 2d 1312, 1315 (N.D. Ga. 2001) ("Virtually all federal courts that have analyzed Section 1981 claims in the retail merchandise context have required the plaintiff to show that he was actually prevented from making a purchase.") (citing cases); *Jackson* v. *Tyler's Dad's Place, Inc.*, 850 F. Supp. 53, 56 (D.D.C. 1994) (granting summary judgment where plaintiffs were "invited to dine in the bar area but refused"), *aff'd*, 107 F.3d 9[illegible] (D.C. Cir. 1996) (mem.).

F. Supp. 2d 1066, 1069 (S.D. Cal. 2000).[3] Finally, district courts have rejected the notion that an accusation of shoplifting, even if false, is sufficient to state a claim under Section 1981 because "such a theory would come close to nullifying the contract requirement of section 1981 altogether, thereby transforming the statute into a general cause of action for race discrimination in all contexts." *Lewis* v. *J.C. Penney Co.*, 948 F. Supp. 367, 371-72 (D. Del. 1996).[4]

These cases show not only that Plaintiff's claim would have been dismissed in many courts, but also that these issues arise in the retail setting every day and thus a decision by this Court is profoundly warranted.

2. In contrast to the decisions above, the Third and Sixth Circuits, like the court of appeals below, have adopted a more sweeping view of the "make and enforce contracts" provision of Section 1981.

For instance, the Third Circuit has held that a Section 1981 claim can stand even where there has been no showing of a denial of service to the customer. See *Hall* v. *Pennsylvania State Police*, 570 F.2d 86, 88 (3d Cir. 1978). In *Hall*, an African-American bank customer brought a claim under Section 1981 because his bank allegedly had a policy of photographing African-American customers, but not white customers, when they entered the bank. *Id.* at 92. The district

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[3] *See also Bobbitt by Bobbitt* v. *Rage Inc.*, 19 F. Supp. 2d 512, 518 (W.D.N.C. 1998) ("'[T]he mere fact of slow service in a fast-food restaurant does not . . . rise to the level of violating one's civil rights'"); *cf. Robertson* v. *Burger King, Inc.*, 848 F. Supp. 78, 81 (E.D. La. 1994) (delay in service does not support claim under Section 1981).

[4] *See also Garrett v. Tandy Corp.*, 142 F. Supp. 2d 117, 119 (D. Me. 2001) (noting that accusation of shoplifting failed to state claim under Section 1981 because that conduct did not "interfere with contract . . . rights" of plaintiff); *Rogers*, 135 F. Supp. 2d at 1313, 1315 (holding that conduct, including accusation of shoplifting, failed to support Section 1981 because it occurred after transaction had been completed).

court concluded that plaintiff could not bring a Section 1981 claim because he "did not allege deprivation of any contractually related right because of race." *Id.* at 89. The Third Circuit reversed, holding that "Section 1981 obligates commercial enterprises to extend the same treatment to contractual customers 'as is enjoyed by white citizens.'" *Id.* at 92.

Similarly, in *Christian* v. *Wal-Mart Stores, Inc.*, 252 F.3d 862 (6th Cir. 2001), the Sixth Circuit reversed the grant of judgment as a matter of law to a defendant as to a Section 1981 claim at the close of the customers' case. *Id.* at 872. There, Christian, who was African-American, and Edens, who was white, were shopping together at a Wal-Mart store. *Id.* at 864. The women were stopped when a store employee suspected that Christian had been shoplifting. *Id.* at 865. The employee subsequently saw the missing item returned to the shelf and called a cashier to tell the police not to come to the store. *Id.* at 866. The police nevertheless arrived and, upon the store manager's recommendation, asked both women to leave the store. *Id.*

In reversing, the Sixth Circuit established a sweeping standard for Section 1981 claims in the commercial establishment context. Relying upon *Callwood* v. *Dave & Buster's, Inc.*, 98 F. Supp. 2d 694 (D. Md. 2000), the Sixth Circuit held that a plaintiff could prevail under Section 1981 not only where he was "deprived of services" while "similarly situated persons outside the protected class were not" but also where a plaintiff actually "received services in a *markedly hostile manner* and in a manner which a reasonable person would find objectively discriminatory." *Christian*, 252 F.3d at 872 (emphasis added). Thus, under the Sixth Circuit's standard, a plaintiff can bring a Section 1981 claim *even if* plaintiff is not

denied service, but where the manner in which such service is provided is "markedly hostile."[5]

Further, in this case, the Tenth Circuit ruled that a brief investigative stop was sufficient to state a claim under Section 1981 because it occurred while Plaintiff was redeeming a fragrance coupon. Pet. App. 16a. In the majority's view, Plaintiff stated a cause of action under Section 1981 because there was evidence from which the jury could conclude that there had been an "interruption of an ongoing transaction" by the Dillard's security guard. *Id.* at 16a n.3. In context, this holding is breathtaking in its scope. Here, it was undisputed that the investigative stop lasted at most five minutes, that Hampton was not prevented from redeeming her fragrance coupon after the investigative stop, and that Hampton acknowledged that she returned to the fragrance counter after the investigative stop but did not seek to redeem her fragrance coupon because "'it wasn't a concern to her.'" *Id.* at 90a.[6]

B. The Decision Below Squarely Implicates This Conflict Among The Courts Of Appeals.

The ruling of the court of appeals in this case squarely implicates this substantial conflict among the circuits as to the

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[5] Other courts have adopted the *Callwood* court's expansive reading of Section 1981. *See, e.g., Bethea* v. *Michael's Family Rest. & Diner*, No. 00-6216, 2001 WL 722566, at *3 (E.D. Pa. June 26, 2001) (relying upon *Callwood* to hold that allegations of delay in service were sufficient to state claim under Section 1981).

[6] Consistent with these decisions, district courts also have concluded that plaintiffs can recover under Section 1981 even where they have not been denied service. *See, e.g., Buchanan* v. *Consolidated Stores Corp.*, 125 F. Supp. 2d 730, 735 (D. Md. 2001) ("[t]he fact that purchases were made is not dispositive" because "Courts have allowed § 1981 claims to proceed even though a plaintiff was allowed to complete his or her sales transaction or contract with the defendant"); *Williams* v. *Cloverleaf Farms Dairy, Inc.*, 78 F. Supp. 2d 479, 485 (D. Md. 1999) (allowing section 1981 claim on the basis of "delay in completing the transaction" coupled with "alleged racial attack").

legal standards for determining whether conduct violates the "make and enforce contracts" provision of Section 1981.

1. Under the standards adopted in *Morris*, *Bagley*, *Bellows*, and *Youngblood*, Hampton could not have recovered because the temporary delay resulting from the investigative stop did not violate Hampton's right to "make and enforce contracts" under Section 1981. Under *Morris*, Hampton could not have recovered because she failed to show "the actual loss of a contract interest." See *Morris*, 89 F.3d at 414. That is, both before and after the investigative stop, Hampton retained the contractual right to redeem her coupon at the fragrance counter. Put another way, as the Fifth Circuit has ruled, there was no evidence that Plaintiff's contractual relationship "was in any way changed, modified, altered, terminated, or otherwise affected by any of [Dillard's] actions." *Bellows*, 118 F.3d at 275.

That conclusion is confirmed by analyzing the bases for the jury's compensatory and punitive damages awards against Dillard's. As explained by the panel majority, "any economic damage that resulted from the store's intentional interference with the redemption of the fragrance sample was negligible." Pet. App. 32a. Rather, the compensatory award was predicated on Hampton's emotional distress arising from an accusation, made in front of the children who were with her in the store, that Plaintiff (or her niece Cooper) had been shoplifting. Of course, that accusation and those emotional injuries have nothing to do with Plaintiff's rights under Section 1981 to "make or enforce" the fragrance coupon that she received as a benefit of her purchase of clothing from Dillard's. Nothing "in this case would have been different had Mr. Wilson intercepted plaintiffs before, during or after they redeemed their fragrance coupons" because it was the "wrongful accusation of shoplifting, not the denial of her free

fragrance sample, which caused Ms. Hampton's alleged injuries." *Id.* at 46a (Anderson, S.J., dissenting).[7]

Further, under *Bagley*, Hampton could not have recovered based solely upon the delay resulting from the investigative stop because she was not prevented from redeeming her fragrance coupon. 220 F.3d at 521-22. Although, as in *Bagley*, Plaintiff undoubtedly took offense when a Dillard's employee asked to search the Dillard's shopping bag that Hampton was carrying, there is no question that Hampton could have redeemed her coupon at the fragrance counter after the brief stop. Indeed, even the panel majority acknowledged that "Wilson's testimony does not suggest he had the subjective intent to prevent the redemption of the coupon." Pet. App. 16a. Rather, the "purely fortuitous" timing of the interruption merely delayed the redemption of the fragrance coupon in the same way that the hostile treatment by the employee in *Bagley* delayed the plaintiff's effort to purchase a phone. 220 F.3d at 522. But, in *Bagley*, the Court held that a plaintiff cannot recover if he "opted not to contract with [defendant]" by "leaving the store" and abandoning the opportunity to complete the contractual transaction. *Id.* at 521-22. In the same way, after filing a complaint with the store's service department, Hampton returned to the fragrance counter, but never attempted to redeem the fragrance coupon because "'it wasn't a concern to her.'" Pet. App. 90a.

Finally, under the standards adopted in *Youngblood*, where the plaintiff's purchase was confiscated by defendant, Hampton could not recover because the delay in redeeming the fragrance coupon was undoubtedly far less intrusive than

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[7] The same is true of the punitive award that the panel majority affirmed based upon evidence "about the coding and close surveillance of African-American shoppers," Pet. App. 35a, and not with any "nominal" economic injury arising from the delay in redeeming the fragrance coupon.

the conduct in *Youngblood*. See 266 F.3d at 854. Instead, Plaintiff was subjected to a brief delay occasioned by an investigative stop that was supported by probable cause and conducted in an objectively reasonable manner. Pet. App. 95a-96a. Hampton retained the benefit of the clothes that she purchased as well as the contractual right to redeem the fragrance coupon after the investigative stop.[8]

2. The court of appeals' implicit suggestion that its decision is consistent with the standards adopted by other courts of appeals such as *Morris* does not survive scrutiny. Pet. App. 16a n.3. In responding to Judge Anderson's showing that no evidence supported the conclusion that Wilson had "the subjective intent to prevent the redemption of the coupon," *id.* at 16a, the majority purported to rely upon the Seventh Circuit's decision in *Morris*. Specifically, the majority argued that cases such as *Morris* support the view that "inopportune timing neither alters the resulting interruption of an ongoing transaction nor defeats this § 1981 action." *Id.* 16a n.3 (citing *Morris* for the proposition that Section 1981 claim fails where plaintiffs were stopped "after making purchase" and thus "'were neither denied neither admittance nor service, nor were they asked to leave the store'").

But the panel misinterprets *Morris*. There, the Seventh Circuit's decision was not based upon "inopportune timing" (from the perspective of plaintiffs), but on the threshold

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[8] The *Youngblood* court purported to distinguish the decision in this case by arguing that, here, the fragrance coupon extended the benefits of the purchase contract. 266 F.3d at 854. But that distinction is illusory. Under the Eighth Circuit's holding in *Youngblood*, Dillard's could have confiscated Hampton's purchases and her coupon because Hampton had already completed her purchase. Applying the holding in *Youngblood*, Hampton would not be able to bring a Section 1981 claim if her purchases and coupon had been confiscated after being stopped on a suspicion of shoplifting, although she could bring a conversion claim for the value of the confiscated property.

failure by plaintiffs who "did not attempt to make any further purchases" and therefore could not allege "the actual loss of a contract interest." *Morris*, 89 F.3d at 414. So too here, the "purely fortuitous" timing of the investigative stop also should have been irrelevant to whether Hampton was deprived of her contractual right to redeem the free fragrance coupon. Her decision to abandon any contractual rights that she had with respect to the free fragrance sample after the investigative stop is fatal to her ability to demonstrate that she suffered an "actual loss of a contract interest" under *Morris*.

In sum, there is a hopeless conflict among the courts of appeals regarding the legal standards that govern whether conduct violates the "make and enforce contracts" component of Section 1981, and only this Court can resolve that intolerable situation.

C. The Proper Application Of Section 1981 Presents An Important And Recurring Issue Of Federal Law.

This Court has upon repeated occasions grappled with cases raising questions regarding the proper scope of the nation's civil rights laws in general, and the scope of Section 1981 in particular.[9] The Court's close attention to cases involving the

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[9] *See, e.g.*, *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 313 (1994) (holding that 1991 Amendments to Section 1981 apply prospectively only); *Jett* v. *Dallas Indep. Sch. Dist.*, 491 U.S. 701, 735 (1989) (holding that Section 1983 provides "the exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor"); *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172, 176 (1989) (reaffirming that Section 1981 "prohibits racial discrimination in the making and enforcement of private contracts" but is not "a general proscription of racial discrimination in all aspects of contract relations"); *Saint Francis Coll.* v. *Al-Khazraji*, 481 U.S. 604, 613 (1987) (holding that Section 1981 applies to discrimination based upon "ancestry or ethnic characteristics"); *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 391 (1982) (holding that Section 1981 "can be violated only by purposeful discrimination"); *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295, 296 (1976) (holding that Section

interpretation of these statutes reflects, in no small measure, the importance of their proper and uniform construction. Here there can be no doubt of the need for or importance of an authoritative ruling resolving the conflict regarding the proper legal standard for determining whether conduct violates the "make and enforce" contracts provision of Section 1981. This is particularly so in light of the inconsistent decisions of the courts of appeals since Congress' 1991 Amendments to Section 1981. Indeed, apart from ruling that the 1991 Amendments usher in a "new standard of conduct" and therefore applied prospectively only, this Court has had no occasion to delineate the legal bounds of Section 1981 since Congress' amendments. See *Rivers*, 511 U.S. at 304.

Second, the competing interests at issue include not only the consistent enforcement of federal civil rights laws, but also the regulation of contractual rights and the ability of retailers to carry on their day-to-day business. As reflected in Part A, numerous district courts and courts of appeals have been presented with allegations concerning the scope of the "make and enforce contracts" provision of Section 1981 in cases brought by retail customers. Because of the ubiquitous nature of retail transactions, and because of the magnitude of jury verdicts such as the one in this case, there can be no doubt that the filing of such cases will continue. Due to the conflicting interpretations of the scope of Section 1981's protections and obligations, however, neither consumers nor retailers are subject to uniform rights and obligations throughout the country. Moreover, because large retailers operate stores in many parts of the country, they are subjected to needless uncertainty, are unable to enforce consistent policies and instead must implement a patchwork of

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1981 prohibited "discrimination in the making or enforcement of contracts against . . . any race" including "white[s]"); *Runyon* v. *McCrary*, 427 U.S. 160, 168 (1976) (ruling that Section 1981 applied to private contracts); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975) (stating that Section 1981 applies to private employment contracts).

procedures and protocols to satisfy what should be a single national standard.

Third, resolution of this conflict is important because the proper scope of the "make and enforce contracts" provision of Section 1981 implicates important questions regarding the division of authority between Federal and State government. Indeed, the expansive interpretation of the scope of Section 1981 caused the court of appeals effectively to deny the protections afforded to retailers under State law. Pet. App. 19a & n.4. Here, the court of appeals acknowledged that the stop complied with State law requirements—namely Kansas' statutory merchants defense—but concluded that such compliance was irrelevant to the Section 1981 issue. *Id.* at 19a n.4. To be sure, Dillard's compliance with the probable cause safe-harbor under State law may not necessarily be determinative of Plaintiff's Section 1981 claim, *id.*, but State law certainly is not irrelevant to determining the proper scope of Section 1981. See *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 479 (1977) (explaining that, unless Congress plainly directs, the Court is "reluctant to federalize" matters traditionally covered by state common law). Moreover, restraint in construing a federal statute is especially appropriate where, as here, a more expansive interpretation of a congressional enactment would approach the constitutional limits of congressional authority. See, *e.g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 500 (1979).

Finally, as shown above, this case directly implicates the conflict among the courts of appeals and thus presents an appropriate vehicle for resolving the conflict and announcing a single uniform standard for determining whether conduct violates the "make and enforce contracts" provision of Section 1981. See *supra* at 13-22. The Court simply should not allow recovery under Section 1981 to depend solely on the fortuity of geography.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT

Nos. 98-3011, 98-3261, 98-3306.

PAULA DARLENE HAMPTON,
Plaintiff,

DEMETRIA COOPER,
Plaintiff-Appellant,

v.

DILLARD DEPARTMENT STORES, INC.,
Defendant-Appellee,

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW,
Amicus Curiae.

PAULA DARLENE HAMPTON,
Plaintiff-Appellee,

DEMETRIA COOPER,
Plaintiff,

v.

DILLARD DEPARTMENT STORES, INC.,
Defendant-Appellant,

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW,
Amicus Curiae.

PAULA DARLENE HAMPTON,
Plaintiff-Appellee,

DEMETRIA COOPER,
Plaintiff,

v.

DILLARD DEPARTMENT STORES, INC.,
Defendant-Appellant.

April 24, 2001

Before HENRY, STEPHEN H. ANDERSON and LUCERO, Circuit Judges.

HENRY, Circuit Judge.

Paula Darlene Hampton filed suit against Dillard Department Stores, Inc. (Dillard's), claiming that the company had unlawfully interfered with her right to make and enforce a contract in violation of 42 U.S.C. § 1981. A jury awarded her compensatory and punitive damages based on its findings that (1) Ms. Hampton "was entitled to a free cologne sample as a benefit or privilege of her purchase on April 5, 1996," Aplt's App. vol. 1, at 147 (verdict form from phase one of trial); (2) Dillard's "intentionally interfered with [her] ability to receive a free cologne sample," *id.*; and (3) Ms. Hampton's "race was a motivating factor in [Dillard's] conduct on April 5, 1996." *Id.* at 160 (verdict form from phase two of trial). Dillard's thereafter filed a motion for judgment as a matter of law, which the district court denied. Dillard's now appeals, raising various objections to the district court's denial of its motion.

We review the district court's denial of Dillard's motion for judgment as a matter of law de novo, "applying the same legal standard as the district court." *Brown v. Gray*, 227 F.3d 1278, 1285 (10th Cir.2000). A party is entitled to judgment as a matter of law "only if the evidence points but one way and is susceptible to no reasonable inferences which may support the opposing party's position." *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808, 812 (10th Cir.2000). It is important to note that, "[i]n reviewing the record, *we will not weigh evidence, judge witness credibility, or challenge the factual conclusions of the jury.* Judgment as a matter of law is appropriate [only] if there is no *legally sufficient evidentiary basis* for a claim under the controlling law. We

consider the evidence, and any inferences drawn therefrom, in favor of the non-moving party." *Brown*, 227 F.3d at 1285 (emphasis added and internal quotation marks omitted).

Thus, Dillard's has a high hurdle to overcome. The focus of Dillard's appeal is on three questions: (1) whether the fragrance coupon was in fact a benefit of Ms. Hampton's purchase; (2) whether there was indeed intentional interference with Ms. Hampton's redemption of the coupon; and (3) whether the interference was in the end based on racial discrimination. We agree with the district court that these are questions of fact, not law, *see, e.g., Hampton v. Dillard Dep't Stores, Inc.*, 18 F.Supp.2d 1256, 1265 (D.Kan.1998) (noting that the issue of discrimination is a question of fact), and the jury made explicit findings as to each. On appellate review, we cannot challenge the jury's findings of fact; instead, we may only ask whether there was a "legally sufficient evidentiary basis for a reasonable jury to find for [Ms. Hampton]" on each fact. Fed.R.Civ.P. 50(a). Because there was such a basis, we must affirm the district court's order.

I. BACKGROUND

The following material facts are taken from the district court's orders below and from the trial transcript. These facts are undisputed, or where disputed, are taken, as we are required to take them, in the light most favorable to Ms. Hampton. We shall first briefly summarize the facts in this case, while we reserve a more detailed description of the evidence for later discussion of specific issues raised by the parties.

On April 5, 1996, Ms. Hampton and her niece, Demetria Cooper, both African Americans, were shopping for an Easter outfit for Ms. Cooper's one-year-old son in the Dillard's children's department in Overland Park, Kansas. The plaintiffs had four children with them: Ms. Cooper's son, Ms. Hampton's eight-month-old and seven-year-old daughters, and her elder daughter's friend.

Shortly after they entered the store, Tom Wilson, a Dillard's security officer, noticed them. He observed them for more than fifteen minutes. Mr. Wilson testified that he paid close attention to the party, in part, because they had a stroller with them, because Ms. Cooper had a rolled-up dark cloth item in her hand, and because Ms. Cooper kept looking up at the ceiling and glancing around, as if to check to see if she was being watched. Because his suspicions were aroused, he asked fellow employee Pam Fitzgerel to continue the surveillance in a fitting room in the children's department, where the plaintiffs were trying clothing on Ms. Cooper's one-year-old son. At trial, Ms. Fitzgerel testified that Ms. Cooper was holding a rolled-up cloth item in the fitting room; that she later saw an item under Ms. Cooper's jacket; and that, believing the item to be store merchandise, she contacted Mr. Wilson and told him that she was positive that Ms. Cooper had put something under her coat.

The group left the fitting room and Ms. Hampton proceeded to purchase an outfit for Ms. Cooper's son from the salesclerk in the children's department. When she did so, the sales associate gave Ms. Hampton and Ms. Cooper each a coupon that was redeemable at the fragrance counter for cologne samples. The shopping group then proceeded on to the fragrance counter, which is located where the Dillard's store ends and opens into the Oak Park Mall, to redeem their fragrance coupons.

While the women were in the process of redeeming their coupons and while the women were in a conversation with fragrance consultant Betty Chouteau, Mr. Wilson interrupted them. Referring to Ms. Cooper, he advised Ms. Hampton that "the . . . black female had been observed placing something in her coat." Aple's Supp.App. at 121 (Dillard's Security Report, dated Apr. 5, 1996). He asked to look inside the Dillard's bag carried by Ms. Hampton, took the bag, and emptied the contents on the fragrance counter. Mr. Wilson

checked the items against the receipt and determined that they corresponded. Ms. Chouteau testified that she perceived it to be "a rather embarrassing situation" for the women and, upon Mr. Wilson's intervention, she "turned and started talking to other people." Aplt's App. vol. 3, at 624 (testimony of Ms. Chouteau).

While Mr. Wilson was matching up items to the receipt, Ms. Hampton became visibly upset and told Mr. Wilson that, as a regular customer of Dillard's, she did not appreciate being accused of shoplifting and she did not deserve to be treated this way. Mr. Wilson told her to calm down or he would call the Overland Park police and have her removed from the store. Ms. Hampton asked Mr. Wilson his name and the location of the customer service counter. She then proceeded to the customer service counter and had no more contact with Mr. Wilson. The encounter with Mr. Wilson lasted approximately five minutes. Ms. Hampton and Ms. Cooper subsequently filed suit against Dillard's, alleging false imprisonment under Kansas law and a violation of 42 U.S.C. § 1981.

A. *Procedural History*

Ms. Hampton and Ms. Cooper based their state tort claims on their detention by Mr. Wilson. They based their § 1981 claims on the observation and detention by Mr. Wilson and on the store's disparate security practices of "arresting or detaining African-American shoppers at a significantly greater rate than it arrests or detains white shoppers." Aplt's App. vol. 1, at 5 (complaint). They alleged that their "detention was a part of this pattern or practice." *Id.*

Following the close of discovery, Dillard's moved for summary judgment on both claims. The district court granted Dillard's summary judgment on the state tort claims and on most of the § 1981 claims. The only § 1981 claim that the

district court allowed to proceed to trial was the claim that Dillard's interfered with the plaintiffs' ability to redeem the perfume sample.

The district court noted, however, that whether *Ms. Cooper's* coupon claim was actionable remained in doubt, as the coupon was not received by Ms. Cooper as the result of a purchase but as a benefit of *Ms. Hampton's* purchase. The court ordered Ms. Cooper to show cause why her claims should survive in the absence of any purchase made by her. The court subsequently rejected Ms. Cooper's contention that, as a third-party beneficiary of the sale to Ms. Hampton, her § 1981 claim should survive, and the court in turn dismissed Ms. Cooper's remaining claim on the day before trial.

Noting that our § 1981 jurisprudence requires that the action interfered with must be based on a contract, *see Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1267 (10th Cir.1989) (requiring actual loss of a contract interest for a § 1981 claim for interference with the right to make and enforce a contract),[1] the district court decided to bifurcate the trial. In the first phase, the jury was to determine whether the fragrance sample was a benefit of Ms. Hampton's purchase from Dillard's and whether Dillard's intentionally interfered with the redemption of the coupon. If the jury found the coupon was a benefit of purchase and that Dillard's intentionally interfered, it would proceed to phase two, in which it would determine whether the store's intentional interference was racially motivated. The jury found for Ms. Hampton on all of the issues presented in both phases, and awarded her $56,000 in compensatory damages and $1.1 million in punitive damages. The district court entered judgment in

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[1] Although our decision in *Phelps* predated the 1991 amendments to § 1981, these amendments do not alter the requirement of an actual loss of a contract interest. *See, e.g., Wesley v. Don Stein Buick*, 42 F.Supp.2d 1192, 1200 n. 7 (D.Kan.1999).

accordance with the verdict and rejected Dillard's Motion for Judgment as a Matter of Law, or Alternatively for a New Trial or Remittitur.

Dillard's now appeals the district court's denial of its motion for judgment as a matter of law and claims that (1) it is entitled to judgment on Ms. Hampton's § 1981 claim because the coupon was not a contract; (2) if the coupon was a contract, there was no interference with a contract interest; and (3) there was no interference with a contract interest based on racial discrimination. Dillard's also appeals the district court's denial of a new trial and contends it was unfairly prejudiced by (1) various instructional errors that misled the jury and (2) various evidentiary admissions and exclusions that were in error. Finally, Dillard's challenges the award of compensatory and punitive damages and the award of attorney's fees.

In addition, Ms. Cooper appeals the district court's dismissal of her § 1981 claim and her state law claim. The Lawyer's Committee for Civil Rights has filed an amicus curiae brief in support of (1) affirmance of the verdict and judgment in favor of Ms. Hampton and (2) reversal of the dismissal of Ms. Cooper's claims. Beginning with the defendant's appeal, we shall review each contention in turn.

II. CASE NOS. 98-3011, -3261 ANALYSIS

A. Ms. Hampton's § 1981 Claim

1. Elements of a § 1981 Claim

With respect to 42 U.S.C. § 1981, to establish a prima facie case of discrimination under § 1981,[2] the plaintiff must show:

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[2] Specifically, § 1981 provides:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce

(1) that the plaintiff is a member of a protected class;

(2) that the defendant had the intent to discriminate on the basis of race; and

(3) that the discrimination interfered with a protected activity as defined in § 1981.

See Reynolds v. School Dist. No. 1, Denver, Colo., 69 F.3d 1523, 1532 (10th Cir.1995) ("Section 1981 prohibits racial discrimination in 'the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.'") (quoting 42 U.S.C. § 1981); *see also Bellows v. Amoco Oil Co.*, 118 F.3d 268, 274 (5th Cir.1997) (listing three elements); *Morris v. Office Max, Inc.*, 89 F.3d 411, 413 (7th Cir.1996) (applying elements to retail transaction). These elements "are flexible and are not to be applied rigidly." *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 530 n. 2 (10th Cir.1994).

Typically, most litigation involving § 1981 claims has emanated from the right to make and enforce employment

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contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the *making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.*

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981 (emphasis supplied).

contracts. *Cf.* S.Rep. No. 101-315 (1990) (noting that § 1981 was a response to "a series of recent decisions addressing employment discrimination claims" where "the Supreme Court cut back dramatically on the scope and effectiveness of civil rights protections" and that the purpose of the act is "to respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions"); *Morris*, 89 F.3d at 413 (noting predominance of § 1981 claims addressing employment discrimination). However, the statute has been applied to discrimination claims arising in the retail sector and restaurant industry, when a contract has been established. *See, e.g., Bobbitt v. Rage, Inc.*, 19 F.Supp.2d 512, 518-20 (W.D.N.C.1998) (allowing action to proceed where plaintiffs, who were forced to prepay for food in pizza restaurant, demonstrated that the restaurant altered a fundamental characteristic of the food service based on race); *Washington v. Duty Free Shoppers, Ltd.*, 710 F.Supp. 1288, 1289-90 (N.D.Cal.1988) (denying summary judgment to defendant where African American were customers told they needed to show a passport and airline tickets before shopping for duty-paid goods, while other customers were not required to do so).

Applying the prima facie elements to the factual setting of this case, the district court instructed the jury that the plaintiff must establish:

> First, that plaintiff was entitled to a free cologne sample as a benefit or privilege of her purchase on April 5, 1996;
>
> Second, that defendant intentionally interfered with plaintiff's right to enjoy the benefits and privileges of that purchase; and
>
> Third that plaintiff's race was a motivating factor in defendant's conduct. Aplt's App. at 151 (Instruction 18). We will discuss each of these elements, beginning with whether there was interference with a contract.

2. The Coupon as Part of the Purchase Contract

Dillard's appeals the district court's denial of its motion for judgment as a matter of law, first contending that the coupon was not a contract. We review the district court's denial of a motion for judgment as a matter of law de novo, applying the same legal standard as the district court. *See Deters v. Equifax Credit Info. Servs., Inc.*, 202 F.3d 1262, 1268 (10th Cir.2000). But the legal standard that we and the district court must use is, as noted earlier, difficult for the movant: a party is entitled to judgment as a matter of law only if the "evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion." *Id.* (internal quotation marks omitted). In reviewing the record, we "will not weigh evidence, judge witness credibility, or challenge the factual conclusions of the jury." *Id.* Judgment as a matter of law is only appropriate if there is no legally sufficient evidentiary basis for a claim under the controlling law. *See id.* We consider the evidence, and any inferences drawn therefrom, in favor of the nonmoving party. *See id.*

Dillard's challenges whether the fragrance coupon was a benefit of Ms. Hampton's contractual relationship for the purchase of children's wear. According to Dillard's, the coupons were promotional invitations, handed out indiscriminately and not exclusively in connection with a purchase. *See* Aplt's App. vol. 3, at 622, 648, 650, 655, 657. Dillard's maintains that the coupon was a gift and that it was never intended to confer a right upon its recipient. In addition, Dillard's points to Ms. Cooper's receipt of a coupon as evidence that a purchase was not required to receive the gift.

In rebuttal, Ms. Hampton argues that we must be mindful of the jury's appraisal of the credibility of the witnesses as well as the jury's resolution of factual issues. *See United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1227 (10th Cir.2000) (noting "[t]he jury has the exclusive function

of appraising credibility, determining the weight to be given to the testimony, drawing inferences from the facts established, resolving conflicts in the evidence, and reaching ultimate conclusions of fact") (internal quotation marks omitted). She and Ms. Cooper testified that, during the time they shopped at the Dillard's store (over an hour), they never saw anyone receive a coupon and saw no one distributing the coupons. The first they saw of the coupons was *after* Ms. Hampton had purchased merchandise. Furthermore, the sales representative from the fragrance company, Ms. Chouteau, testified that the purpose of the promotional coupon, handed out after a customer of Dillard's had made a purchase, was "to entice the shoppers to come to the fragrance [counter] so that we could talk to them about our product." Aplt's App. vol. 3, at 622 (testimony of Ms. Chouteau). All such promotions were supported and agreed to by Dillard's. *See id.* at 663 (testimony of Ms. Dirks, Dillard's operations manager). Finally, Ms. Cooper testified that, upon receipt of the coupons, the children's wear salesperson directed her shopping party toward the appropriate fragrance counter.

Ms. Hampton contends that she performed the steps necessary to act in compliance with the terms and conditions of the offer from Dillard's: she completed a purchase and presented the coupon to the fragrance counter. The performance of these acts, she argues, either constitutes an acceptance or entitles her to "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship," as the statute says.

Clearly, the purpose of the statute is to "make it clear that the right to 'make and enforce contracts' free from race discrimination [is] protected by section 1981." S.Rep. No. 101-315 (1990). Furthermore, the list set forth in subsection (b) of the statute, which gives examples of what might constitute the "making" or "enforcing" of a [sic] under the Act, "is intended to be illustrative rather than exhaustive." *Id.*

We have clarified "that a § 1981 claim for interference with the right to make and enforce a contract must involve the actual loss of a contract interest, not merely the possible loss of future contract opportunities." *See Wesley*, 42 F.Supp.2d at 1200 (citing *Phelps*, 886 F.2d at 1267).

In the context of a retail transaction, this court has not had the opportunity to address or apply subsection (b). *See id.* at 1200 & n. 8 (citing *Morris*, 89 F.3d at 413). There is even less guidance as to what constitutes a contract for the purposes of a § 1981 claim involving a retail transaction, and as such, we are authorized to look to common law. *See* 42 U.S.C. § 1988(a).

Section 45 of the *Restatement (Second) of Contracts* provides illumination on the common law of contracts regarding an invitation to accept an offer by performance:

> (1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.
>
> (2) The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.

Restatement (Second) of Contracts § 45 (1981). The Comment to § 45 further provides that

> [t]his Section is limited to cases where the offer does not invite a promissory acceptance. Such an offer has often been referred to as an "offer for a unilateral contract." Typical illustrations are found in offers of rewards or prizes. . . .

Id. § 45 cmt. a; *see also Brown v. State*, 230 Wis.2d 355, 602 N.W.2d 79, 88 (Ct.App.1999) (noting that "performance by the entrant of the act requested by the sponsor—there,

returning an eligibility card—constitutes an acceptance of an offer and forms a binding contract;" also noting that nearly all jurisdictions have adopted the rule "that contract law governs the sponsor-contestant relationship") (internal quotation marks omitted). Here, Dillard's offered a variance of an option or unilateral contract to Ms. Hampton, and she completed the invited performance in accordance with the terms of the offer. *See Restatement (Second) of Contracts* § 45; *cf. Perry v. Burger King Corp.*, 924 F.Supp. 548, 552 (S.D.N.Y.1996) (denying motion to dismiss where customer finished meal and sought to use restaurant's restroom facilities; noting that plaintiff may be "considered to have contracted for food *and* use of the bathroom" as benefit of contractual relationship).

Dillard's also contends that Ms. Cooper's receipt of a coupon undermines the jury's finding that the coupon was a benefit of Ms. Hampton's purchase contract. We disagree. Ms. Cooper, whose child received the clothing, was a part of the shopping party, and perhaps the store clerk thought Ms. Cooper too should receive the coupon. The jury weighed testimony regarding the receipt of such coupons by non-purchasing customers and determined that the evidence weighed in favor of Ms. Hampton, *i.e.*, the coupon was a benefit of Ms. Hampton's contractual relationship with Dillard's.

With regard to the purpose of the coupon, Ms. Chouteau testified that it served "to entice the shoppers" to sample her company's products. Aplt's App. vol. 3, at 622 (testimony of Ms. Chouteau). She also stated that coupon holders were " 'entitled to'" a fragrance sample. *Id.* at 625. In addition, we note that the benefit ran to Dillard's as well: to sample those products, the customer would traverse the store, perhaps eyeing other merchandise for purchase from Dillard's. The jury's credibility determinations and conclusion that the coupon conferred a right to a fragrance sample as a benefit of

a contractual relationship are not against the weight of the evidence as a matter of law. Whether or not this providing of the sample in hopes that a customer would walk back through the store and purchase cologne or another item was itself an option or unilateral contract, we cannot say that the jury's conclusion that the coupon was a benefit of Ms. Hampton's contract with Dillard's was unreasonable.

3. Intentional Interference with Redemption of the Coupon

Dillard's also sought judgment as a matter of law because Ms. Hampton suffered no actual loss of a contract right or interest. *See Phelps*, 886 F.2d at 1267 (emphasizing that actual loss is protected by § 1981, not possible loss); *Morris*, 89 F.3d at 414-15 ("A claim for interference with the right to make and enforce a contract must allege the actual loss of a contract interest, not merely the possible loss of future contract opportunities.") (citing *Phelps*, 886 F.2d at 1267). Dillard's contends that Ms. Hampton was not denied a service or product, as required by *Morris*. At trial, Mr. Wilson testified on behalf of Dillard's that he stopped the women while they were approaching the store's exit and that he did not believe them to be exchanging their coupons for fragrance samples.

A recollection of Mr. Wilson's testimony may explain why the jury and district court reached the decisions that they did:

> Q: What did you think Paula Hampton and Demetria Cooper were doing when you approached them?
>
> A: They were getting ready to exit the Dillard's store to go out into the mall.
>
> Q: Okay. Did you notice that they were speaking with a cosmetic associate or a fragrance consultant when you approached the two ladies?
>
> A: No, I did not.

Q: Did you knowingly prevent Paula Hampton from receiving a free cologne sample?

A: No, I did not.

Aplt's App. vol. 3. at 634 (testimony of Mr. Wilson). Thus, we have a trained security guard claiming that he did not notice that the women were redeeming a coupon. Indeed, he did not notice that they were shopping or even talking with a salesperson.

This testimony was directly contested by Ms. Hampton and Ms. Cooper. The jury could have resolved this conflict based on their evidence, but the silver bullet may have been the testimony of Ms. Chouteau, the perfume consultant:

Q: [D]o you recall Paula Hampton and Demetria Cooper and their children coming up to the cosmetics counter?

A: I do.

Q: Do you recall that their discussion with you was interrupted by a Dillard's security officer?

A: Yes, I do.

. . . .

Q: When [O]fficer Wilson came up and spoke, what did you do then?

A: Well, because it was a rather embarrassing situation and because I was very busy with a lot of other things going on, I turned and started talking to other people at the time with my back to them.

Q: With your back to whom?

A: To the officer and Paula. I mean, I just felt like it was an embarrassing situation for them and I felt uncomfortable, you know, watching, so I turned and went ahead and did what I was supposed to be doing.

Aplt's App. vol. 3 at 621-22, 624 (testimony of Ms. Chouteau).

Once again, the evidence in the record is sufficient for the jury to determine that Mr. Wilson deliberately interfered with Ms. Hampton's redemption of the coupon and that she suffered an actual loss of a privilege of her contract because of this interruption. Ms. Hampton testified that after he approached her and identified himself while she was at the fragrance counter, Mr. Wilson "took [her shopping] bag, dumped the contents out on the counter, and compared them to the receipt that was in the bag, and then he shoved everything back at [her]." Aplt's App. vol. 3, at 830 (testimony of Ms. Hampton). After this, Ms. Hampton told Mr. Wilson she was shocked to be accused of shoplifting, and Mr. Wilson subsequently threatened to have her removed from the store. *See id.* at 830-32.

The jury concluded that, had there been no interference, Ms. Hampton would have received the service of [her] redemption of the coupon. As the district court noted, the "plaintiff produced legally sufficient evidence that Wilson intentionally interfered with the redemption of the coupon." *Hampton*, 18 F.Supp.2d at 1264. We do not question the jury's credibility determinations, and we cannot say that as a matter of law the jury's conclusion is incorrect. *See Deters*, 202 F.3d at 1268 ("In our review of the record, we will not weigh evidence, judge witness credibility, or challenge the factual conclusions of the jury.")

The dissent notes that Mr. Wilson's testimony does not suggest he had the subjective intent to prevent the redemption of the coupon.[3] We agree, but note that § 1981 protects

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[3] Although the dissent may be quite correct in observing that the timing of Mr. Wilson's interference was "purely fortuitous," Mr. Wilson's inopportune timing neither alters the resulting interruption of an ongoing transaction nor defeats this § 1981 action. *See Morris*, 89 F.3d at 414 (explaining that plaintiffs were stopped *after* making purchase and claim failed because "[t]hey were neither denied neither admittance nor service, nor were they asked to leave the store"); *Wesley*, 42 F.Supp.2d at 1201

enjoyment of the benefits of a contract from *any* impairment, so long as the impairment arises from intentional discrimination. *See* 42 U.S.C. § 1981(a) ("All persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens. . . ."). Thus the proper focus is on whether the defendant had the intent to discriminate on the basis of race, and whether that discrimination interfered with the making or enforcing of a contract. *See Bellows v. Amoco Oil Co.*, 118 F.3d at 274 (listing three elements of prima facie case). We cannot say as a matter of law that the jury's conclusion that Dillard's had the intent to discriminate on the basis of race was incorrect.

Even under the dissent's suggestion that subjective intent to interfere with a contract is required, a reasonable juror could find a legally sufficient evidentiary basis to support such a finding, if it disbelieved Mr. Wilson's testimony. As to the issue of Dillard's intent, the court correctly instructed the jury during the first phase of the trial that Ms. Hampton had the burden of proving by a preponderance of the evidence that "defendant [i.e. Dillard's] intentionally prevented her from redeeming [the] coupon. . . ." Aplt's App. vol. 1, at 139 (Instruction 10). We note that, because "[t]he issue of intent . . . is one that is often not susceptible to direct proof," the jury correctly "consider[ed] all conflicting inferences" that the circumstantial evidence presented. *See Washington*, 710 F.Supp. at 1289 (citing *Rogers v. Lodge*, 458 U.S. 613, 618, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982)). The jury weighed the conflicting testimony and made its credibility determinations, apparently in favor of Ms. Chouteau, who made it

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(dismissing § 1981 claim because plaintiff unable to point to any evidence in the record that she "intended to purchase a car during her visit"); *Lewis v. J.C. Penney Co.*, 948 F.Supp. 367, 372 (D.Del.1996) (dismissing § 1981 claim because plaintiff "had *done* her shopping and was leaving the store" when security guards stopped her) (emphasis added); *Robertson v. Burger King*, 848 F.Supp. 78, 81 (E.D.La.1994) (dismissing § 1981 claim where "plaintiff was not denied admittance or service").

clear that Mr. Wilson interrupted an ongoing transaction. As discussed below, the jury concluded there was sufficient indirect evidence of a discriminatory motive on the part of Dillard's and Mr. Wilson. As such, we cannot say that "the evidence points but one way, and is susceptible to no reasonable inferences supporting [Ms. Hampton's] claim." *Tyler*, 232 F.3d at 816.

4. Racial Discrimination

Dillard's next contends that it deserved judgment as a matter of law because there is no evidence of racial discrimination. In the second phase of the trial, the jury determined that the intentional interference with the contract was racially motivated, and it awarded Ms. Hampton $56,000 in compensatory damages and $1,100,000 in punitive damages.

"A plaintiff who lacks direct evidence of racial discrimination may rely on indirect evidence of discrimination. . . ." *Perry v. Woodward*, 199 F.3d 1126, 1135 (10th Cir.1999). As noted above, because the issue of intent is one that is often not susceptible to direct proof, the jury considers all the conflicting inferences that the circumstantial evidence may present. *See Washington*, 710 F.Supp. at 1289 (citing *Rogers*, 458 U.S. at 618, 102 S.Ct. 3272). In a case where the plaintiff attempts to show intentional discrimination by indirect evidence, the court must employ "the burden-shifting framework first articulated in the seminal case of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)." *Perry*, 199 F.3d at 1134; *see also Kendrick v. Penske Transp. Servs.*, 220 F.3d 1220, 1225 (10th Cir.2000) (noting that "[a] plaintiff alleging discrimination on the basis of race may prove intentional discrimination through either direct evidence of discrimination (*e.g.*, oral or written statements on the part of a defendant showing a discriminatory motivation) or indirect (*i.e.*, circumstantial) evidence of discrimination").

However, after a full trial on the merits, "the single overarching issue" on which we focus is whether the adverse action was motivated by race. *Tyler*, 232 F.3d at 812 (setting out approach); *Stewart v. Adolph Coors Co.*, 217 F.3d 1285, 1288 (10th Cir.2000) (stating that when reviewing sufficiency of the evidence of a racial discrimination claim, "the burden shifting framework of *McDonnell Douglas* is largely irrelevant and the issue is whether the adverse employment action was motivated by race"). Thus, the sequential analysis of *McDonnell Douglas* "drops out" and "our inquiry . . . is whether there was sufficient evidence presented for the jury to infer [Dillard's] reasons were pretextual." *Tyler*, 232 F.3d at 812 & n. 4 (internal quotation marks omitted).

Dillard's contends that Officer Wilson, based on the facts and circumstances, had probable cause to stop Ms. Hampton. However, Dillard's neglects to acknowledge that the jury may have found Mr. Wilson's theory pretextual.[4]

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[4] Dillard's argues that the district court, in dismissing the plaintiffs' state law claims, determined that Mr. Wilson was credible and that he had probable cause to stop the women; therefore Ms. Hampton is precluded from arguing that Mr. Wilson's probable cause was a pretext for discrimination. But, as the district court noted, "[i]n the instant case the Court did not grant Dillard's summary judgment on plaintiff's § 1981 claim, and the Court's probable cause finding at summary judgment was not determinative of the § 1981 claim." *Hampton*, 18 F.Supp.2d at 1266. Although the stop may have complied with state law, "[o]f course, compliance, or the lack of compliance with a state statute is not the yardstick against which to assess a claimed federal constitutional violation." *Tenenbaum v. Williams*, 907 F.Supp. 606, 618 (E.D.N.Y. 1995); *see also Alexis v. McDonald's Restaurants of Mass.*, 67 F.3d 341, 354 (1st Cir.1995) (even assuming state actor had probable cause to initiate stop, plaintiff "tender[ed] competent evidence that a state actor intentionally discriminated against her because she belonged to a protected class"); *Tanner v.. Heise*, 879 F.2d 572, 580 n. 5 (9th Cir.1989) (noting that law officers' "mere compliance with the procedural requisites of state law would not shield them from liability under section 1983").

> "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination."

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)). As noted above, the jury's conclusions indicate it did not find Mr. Wilson's testimony credible.[5] Thus, "[o]ur holding is further fortified by our conclusions that the jury could reasonably infer all [defendant's] previous justifications were pretextual. If the jury found, as a whole [Mr. Wilson] was not credible, its decision to reject [his] proffered reason . . . is, likewise, reasonable." *Tyler*, 232 F.3d at 816.

Ms. Hampton relies primarily on indirect evidence of discrimination. In its memorandum in support of its motion for judgment as a matter of law before the district court, Dillard's defends its security policies as "racially neutral," Aplt's App. vol. 1, at 182, and contends that there was no evidence that the store's employees had a history of denying services or products to African American customers. Dillard's fails to acknowledge that the evidence of discriminatory surveillance, although on its own not actionable under § 1981, *see Lewis*, 948 F.Supp. at 370 (rejected plaintiff's theory of "an unstated, unwritten contract between

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[5] We recognize that on summary judgment the district court found no reason to doubt Mr. Wilson's credibility, but the district court did not have the opportunity to weigh Ms. Chouteau's testimony beyond that provided in her affidavit. As noted above, Ms. Chouteau's conflicting testimony may very well have been the decisive factor that tipped the scales in favor of Ms. Hampton.

commercial establishments and the public, that all who enter premises of the former will be treated equally regardless of race" because it would virtually nullify the contract requirement of § 1981), can certainly be viewed as indirect evidence of discrimination. *See Hall v. Pennsylvania State Police*, 570 F.2d 86, 92 (3d Cir.1978) (stating that policy to photograph African American customers of bank "was not the isolated act of an individual employee, but rather the implementation of a policy deliberately adopted by the bank management to offer its services under different terms dependent on race"); *Washington*, 710 F.Supp. at 1289 (denying defendant's motion for summary judgment where policy of denying services to "suspicious" shoppers targeted African-Americans and stating that "[t]he issue of intent . . . is one that is often not susceptible to direct proof, and a court should consider all conflicting inferences that may be presented by the circumstantial evidence in the case").

Ms. Hampton presented multiple forms of indirect evidence of discrimination. She presented testimony from former Dillard's security officers that corroborated the racial surveillance theory. She also presented testimony that African-Americans were frequently "tracked" upon entering the store; that Dillard's implemented race "codes" that highlighted African-American shoppers as suspicious; that African-Americans were singled out as "suspicious" for returning merchandise without a receipt or for moving between departments while carrying merchandise. *See* Aplt's App. vol. 3, at 745-46, 751, 765-68, 781-85. In addition, store incident reports differentiated shoppers predominantly by race. As to Ms. Hampton specifically, she was noticed and placed under surveillance shortly after entering Dillard's. The district court also noted that Mr. Wilson's "Security Report," despite being less than two pages long, reiterated Ms. Hampton's race twelve times, reflecting implementation of the store's policy and reflecting Mr. Wilson's motivation.

Given this abundant evidence, we agree with the district court and hold that the jury's inference of racial discrimination was a reasonable one.

Finally, Dillard's and the dissent strenuously argue that there is no direct evidence or indication that Mr. Wilson acted with an intent to discriminate. As discussed above, the fact that Mr. Wilson has not admitted discrimination, however, does not mean there is no evidence of discrimination. *See Washington*, 710 F.Supp. at 1289 (rejecting argument that because no employee "admitted in his or her deposition that he or she was discriminating and no store documents reveal discriminating intent, then there is no evidence that they discriminated against plaintiffs" because plaintiffs testified that they "believe[d] they were discriminated against by the store"). As previously noted, there was ample evidence (most tellingly, Mr. Wilson's security report, which reiterated the race of the shoppers a dozen times, and testimony presented to the jury regarding the store's discriminatory coding practices) for the jury to determine that "race was a motivating factor" in Mr. Wilson's interaction with Ms. Hampton. Aplt's App. vol. 1, at 151 (Instruction 18). We therefore hold Ms. Hampton presented sufficient evidence that the reasons given by Mr. Wilson for interference with Ms. Hampton's redemption of the contract were pretextual, and the jury reasonably inferred that Dillard's intentionally discriminated against her on the basis of race. *See Tyler*, 232 F.3d at 816 (reiterating that judgment as a matter of law is appropriate only if "the evidence points but one way, and is susceptible to no reasonable inferences supporting [plaintiff's] claim").

5. Instructions

Dillard's next appeals the district court's denial of its motion for a new trial on the grounds that the district court's instructions were unfairly prejudicial. We review the trial court's denial of a motion for a new trial on the basis that the

jury's verdict is against the weight of the evidence for "a manifest abuse of discretion." *Blanke v. Alexander*, 152 F.3d 1224, 1235 (10th Cir.1998); *see also Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 433, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996) (noting that a federal trial court has "discretion to grant a new trial if the verdict appears to [the court] to be against the weight of the evidence") (internal quotation marks omitted). There is an abuse of discretion when "the verdict is clearly, decidedly or overwhelmingly against the weight of the evidence." *Black v. Hieb's Enters., Inc.*, 805 F.2d 360, 363 (10th Cir.1986).

Dillard's argues that the district court's instructions confused the jury as to the burden of proof and misdirected the focus of the jury's inquiry. On review, "[w]e consider jury instructions in their entirety, applying *de novo* review to determine whether the jury was misled on the applicable law." *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1250 (10th Cir.2000). "Despite this standard of review, we do not require perfection, but we must be satisfied that, upon hearing the instructions, the jury understood the issues to be resolved and its duty to resolve them." *Id.* (internal quotation marks omitted).

a. Instructions 10 and 17.

In phase one of the trial, Instruction 10 set out Ms. Hampton's claims:

> Plaintiff Paula Hampton claims that defendant Dillard Department Stores, Inc., violated her civil rights under 42 U.S.C. § 1981 by intentionally denying her the right to enjoy all benefits and privileges of her contractual relationship with Dillard's, on account of her race. More specifically, plaintiff contends that defendant intentionally prevented her from redeeming a free cologne coupon which Dillard's had given her as a benefit of a purchase in its children's department.

> Ms. Hampton has the burden of proving by a preponderance of the evidence that her claims are more probably true than not true.
>
> Dillard's denies plaintiff's claims and contends that the cologne sample was a free gift, available to all store patrons, rather than a benefit with purchase.

Aplt's App. vol. 1, at 139 (Instruction 10). In phase two of the trial, the district court stated that the phase one instructions applied to the jury's deliberations, with the exception of Instruction 10. Instead, Instruction 17 set out Ms. Hampton's claims, but in a slightly different context:

> Plaintiff Paula Hampton claims that defendant Dillard Department Stores, Inc., violated her civil rights under 42 U.S.C. § 1981 by intentionally denying her the right to enjoy all benefits and privileges of her contractual relationship with Dillard's on account of her race. More specifically, plaintiff contends that defendant's surveillance, detention and search of her belongings constituted a security practice which unequally burdened her as an African-American shopper.
>
> Ms. Hampton has the burden of proving by a preponderance of the evidence that her claims are more probably true than not true.
>
> Dillard's denies plaintiff's allegations.

Id. at 150 (Instruction 17). Dillard's contends that because the above instructions focused the jury on its unrelated prior bad acts, Dillard's was unfairly prejudiced.

We hold that Instruction 17 refocused the jury: in phase one, the jury was to focus on whether the coupon was a contract and whether Dillard's intentionally interfered; in phase two, the jury's primary focus was to determine whether Dillard's acted with a discriminatory motive. The instruction echoed the pretrial order's characterization of Ms. Hampton's

claims—*i.e.*, that Dillard's engaged in disparate surveillance practices that unequally burdened African-American shoppers and violated Ms. Hampton's rights under § 1981. To allow the jury to consider the store's past conduct and practice as *indirect* evidence was not error. These instructions did not mislead the jury. To the contrary, the instructions clearly stated the correct legal standard.

b. Instruction 18.

Dillard's also contends that Instruction 18 further confused the jury, because it suggested that Ms. Hampton's race could be one of several motivating factors behind Dillard's conduct, rather than the determinative factor. Instruction 18 presented the essential elements that Ms. Hampton had to prove to establish her claim of race discrimination under § 1981:

> In order to establish her claim of race discrimination under 42 U.S.C. § 1981, plaintiff must prove the following essential elements are more probably true than not true:
>
> First, that plaintiff was entitled to a free cologne sample as a benefit or privilege of her purchase on April 5, 1996;
>
> Second, that defendant intentionally interfered with plaintiff's right to enjoy the benefits and privileges of that purchase; and
>
> Third, that plaintiff's race was a motivating factor in defendant's conduct.
>
> Because you have already resolved the first two issues in favor of plaintiff, you need only address the third element. On this issue, plaintiff does not have to prove that defendant was motivated only by plaintiff's race, but she must prove that her race was a motivating factor in defendant's decision, that is, that defendant acted, at least in part, because of plaintiff's race.

A "motivating" factor means that but for its unlawful motive, defendant would not have denied plaintiff the right to enjoy the benefits and privileges of her purchase. In other words, you must find that race was at least one of the factors which motivated Officer Wilson to interfere with plaintiff's redemption of the cologne sample. A motivating factor need not be the sole or exclusive reason, however, for Wilson's actions.

While plaintiff must show that defendant intentionally discriminated against her, she is not required to produce direct evidence of intentional discrimination. Intentional discrimination may be inferred from the existence of other facts and may be inferred from showing that defendant's explanation is unworthy of belief.

If plaintiff proves her claim by a preponderance of the evidence, you must return a verdict in favor of plaintiff. If plaintiff does not prove her claim by a preponderance of the evidence, you must decide this claim in favor of defendant.

Aplt's App. vol. 1, at 151-52 (Instruction 18).

Instruction 18 merely restated § 1981's elements and recited the jury's verdict from the first phase of the trial: that Ms. Hampton was entitled to a free cologne sample as a benefit of her purchase and that Dillard's intentionally interfered with her ability to receive a free cologne sample. *See id.* at 147 (verdict form from phase one of trial). The instruction properly stated that the plaintiff bears the burden of establishing that race was a motivating factor in the defendant's decision to discriminate. *See Anaeme v. Diagnostek, Inc.*, 164 F.3d 1275, 1282 (10th Cir.1999) (noting it is "[p]laintiff's ultimate responsibility [to] persuad[e] the jury that race was a motivating factor in the employment decision"). Because we consider jury instructions as a whole in connection with all other instructions given, *see Hall v.*

Western Prod. Co., 988 F.2d 1050, 1058 (10th Cir.1993) ("The appellate court reviews the jury instructions as a whole, not by reviewing single jury instructions."), we hold defendant's argument that Instruction numbers 17 or 18 misled the jury to be without merit.

c. Instruction 19.

Dillard's further argues that the court erroneously instructed the jury to focus on its discriminatory practices when making its apportionment of actual damages. In part, Instruction 19 stated that "[t]he burden is on [the] plaintiff to prove by a preponderance of the evidence the existence and amount of her damages and the fact that defendant's unlawful conduct proximately caused her damages." Aplt's App. vol. 1, at 153. Dillard's contends that the jury's consideration of all of its "unlawful conduct" would include Dillard's allegedly discriminatory surveillance tactics and consequently distorted the award. Because Dillard's did not preserve this issue for review, we review for plain error. *See Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186, 1190 (10th Cir.1997). In order to find plain error we would have to conclude that the instruction was "patently-plainly erroneous and prejudicial." *Id.* (internal quotation marks omitted). We doubt whether this instruction was error, and even if it were, we also doubt that the error would be "patently plainly erroneous and prejudicial." *Id.* We therefore hold that the jury was properly instructed as to the damages it could award and that the instructions did not allow the jury to consider impermissible theories.

d. Proposed Instructions Regarding Summary Judgment.

Finally, Dillard's argues that the district court erred by refusing to give a proposed instruction regarding the district court's grant of summary judgment to Dillard's on the plaintiffs' false imprisonment claims. Specifically, Dillard's contends that the district court's summary judgment ruling

conclusively established that Mr. Wilson acted with probable cause when he stopped Ms. Hampton and Ms. Cooper and that he stopped them at the nexus of the store and the mall.

"Under Rule 56(d), summary adjudication of only some of the claims imposes a duty on the trial court to 'if practicable' articulate what facts are established and which remain controverted." *Anixter v. Home-Stake Prod. Co.*, 977 F.2d 1533, 1548 (10th Cir.1992). Here, the district court granted summary judgment to Dillard's on the false imprisonment claims and a subset of the § 1981 claims, but allowed the § 1981 claim based upon the coupon to proceed. We agree with the district court that "that record is different from the record which [was developed before trial on the coupon claim] and the Court's summary judgment order is immaterial." Aplt's App. vol. 4, at 1184 (Tr. of instruction conference).

As noted above, even if the stop complied with state law, Dillard's is not necessarily shielded from liability under § 1981. *See Tanner*, 879 F.2d at 580 n. 5 ("mere compliance with the procedural requisites of state law would not shield [officers] from liability under § 1983"). Furthermore, there were no findings in the summary judgment order as to Mr. Wilson's subjective beliefs and the store's policies allegedly based on them.

Section 1981 is a unique and powerful statute that focuses on motivation behind a particular action. Whether Mr. Wilson committed a state tort in his fruitless search of Ms. Hampton's belongings is not dispositive of why he targeted her in the first place. For those reasons, the jury was entitled to consider, along with Mr. Wilson's testimony, the testimony of Ms. Chouteau, Ms. Hampton and Ms. Cooper, and the demonstrative evidence. The district court's instruction properly stated the law regarding the issues before the jury and the district court did not abuse its discretion when it refused to give the store's proposed instruction.

6. Admission of Irrelevant and Prejudicial Evidence/ Exclusion of Exculpatory Evidence

Dillard's also sought a new trial arguing that the cumulative effect of the district court's erroneous evidentiary rulings merits a reversal. We review evidentiary rulings for an abuse of discretion. *See Cartier v. Jackson*, 59 F.3d 1046, 1048 (10th Cir.1995). The store's argument centers around the contention that Ms. Hampton's § 1981 claim was exceedingly narrow and therefore the admission of testimony regarding surveillance tactics and loss prevention practices was prejudicial and confusing to the jury.

Dillard's relies upon a continuing objection to opinion testimony about racism by the officer witnesses. The record does not indicate that Dillard's objected to all of the challenged testimony at trial. A party must make a timely and proper objection to preserve an alleged error for appeal. *See United States v. Herndon*, 982 F.2d 1411, 1414 (10th Cir.1992). Failure to so object "constitutes waiver of the issue unless there is plain error resulting in manifest injustice." *Id.* at 1414-15. Whether under an abuse of discretion or plain error review, we conclude that there was no error.

Dillard's focuses on several areas of allegedly prejudicial testimony: (1) testimony that Officer Wilson's supervisor used racial epithets in his previous position as director of security for another employer, (2) testimony by former Dillard's security officers as to training they received regarding treatment of minority shoppers; (3) testimony regarding the racial makeup of Dillard's shoppers and shift logs and arrest reports; (4) lay opinion testimony about Dillard's security officers; and (5) testimony that dated back approximately twenty years as to Officer Wilson's disciplinary proceeding and suspension. In addition, Dillard's

contends that the court erred when it excluded Ms. Hampton's handwritten complaint that she filed with the customer service department after the incident.

The first three alleged evidentiary errors, taken separately or in the aggregate, do not warrant reversal. The use of racial epithets by Mr. Wilson's former supervisor, training practices of the store, its shift incident logs and arrest reports may be viewed as indirect evidence of discriminatory animus. As previously stated, "a § 1981 plaintiff alleging racial discrimination may prove intentional discrimination through either direct or circumstantial evidence." *Tyler*, 232 F.3d at 812. Dillard's had every opportunity to rebut all of the above admitted evidence but instead relied upon its "continuing objection" to all opinion testimony not rationally based on personal knowledge. Aplt's. App. vol. 3, at 713. We hold that the district court did not abuse its discretion.

As to the testimony regarding Officer Wilson's suspension from the Kansas Highway Patrol for falsifying a report in 1977, the district court determined that although the event was remote in time, because it was probative of Mr. Wilson's character for truthfulness, and because Mr. Wilson was able to explain the incident, the court would allow the questioning. The district court did not abuse its discretion in allowing this line of questioning and in allowing the jury to give it appropriate weight. Federal Rule of Evidence 608(b) provides: "Specific instances of the conduct of a witness . . . may, . . . in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness. . . ." Fed.R.Evid. 608(b). One key aspect of this rule is that its application is explicitly within the discretion of the district court. The court did not abuse its discretion.

Finally, Dillard's contends that the district court erred when it excluded Ms. Hampton's written complaint to the store, made immediately after her interaction with Mr.

Wilson. Dillard's alleges that the report was an admission against Ms. Hampton's interest, it closely tracked Mr. Wilson's story, and made no intimation of racial discrimination. The record indicates that Dillard's counsel planned to offer specific facts that were admissions against interest in the report. In fact, Dillard's counsel was able to cross-examine Ms. Hampton thoroughly about the written complaint. Furthermore, Ms. Hampton testified that nothing in the complaint suggested that she believed the interference with her redemption of the coupon was racially motivated. *See* Aplt's App. vol. 3, at 837 (testimony of Ms. Hampton). We hold that Dillard's was not prejudiced by the exclusion of the complaint.

Dillard's also contends the cumulative effect of the errors they appeal unduly prejudiced their case. As we have found no error, there can be no compound effect.

7. Damages

a. Compensatory Damages

Dillard's contends that the compensatory damages award of $56,000 is not supported by the evidence and must be set aside. When a party complains there was insufficient evidence to support a damage award, we must determine whether the damage award is supported by substantial evidence. *See Baty v. Willamette Indus.*, 172 F.3d 1232, 1243 (10th Cir.1999). We view the evidence in the light most favorable to the prevailing party. *See Harolds Stores, Inc. v. Dillard Dep't Stores, Inc.*, 82 F.3d 1533, 1551 (10th Cir.1996).

Dillard's states that any emotional damages Ms. Hampton suffered resulted from Mr. Wilson's belief that her niece was shoplifting and not from any alleged § 1981 interference with her contract. In addition, Dillard's contends that Ms. Hampton's emotional distress, if any, is unsupported by the record.

Ms. Hampton counters that the damages from the accusation and interference with the contract were substantial: she felt humiliated and disgraced by the accusations. Clearly the accusation, though directed at her niece, implicated her as part of the entourage in the dressing room. In addition, Ms. Hampton claims that she, too, was accused of stealing. She contends that her emotional damages were immediately evident, as she was visibly upset after the incident, as well as lasting, as she is now unable to shop with her children for fear of future ridicule and humiliation. Ms. Hampton also claimed her daughter had repeated nightmares regarding the incident.

We note first that any economic damage that resulted from the store's intentional interference with the redemption of the fragrance sample was negligible. Our review of compensatory damages is limited to Ms. Hampton's testimony regarding her emotional suffering. *See Karnes v. SCI Colo. Funeral Servs.*, 162 F.3d 1077, 1080 (10th Cir.1998) (noting availability of compensatory and punitive damages under § 1981). Ms. Hampton testified as to her emotional distress and that of her daughter. *See Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5th Cir.1998) (noting that, in a § 1981a discrimination case, victim's "testimony of anxiety, sleeplessness, stress, marital hardship and loss of self-esteem was sufficiently detailed to preclude us from holding that the district court abused its discretion in its award of compensatory damages"). Ms. Hampton's testimony here was similarly detailed. As the district court noted:

> [I]n this case plaintiff gave eloquent and emotionally moving testimony that Wilson disgraced and humiliated her, in front of her children, that she was too emotionally distraught to drive, and that she had to call her husband for a ride home. Immediately after the incident she was crying and she was so upset that she could not write out a customer comment card, and a Dillard's employee

> filled it out for her. She testified that "I don't feel that my life will ever be the same." The jury was entitled to credit this testimony and to compensate plaintiff accordingly.

Hampton, 18 F.Supp.2d at 1275-76 (citations omitted). We conclude that the award of compensatory damages was well within the district court's discretion.

b. Punitive Damages

Dillard's also seeks to reduce or eliminate the $1.1 million punitive damage award. Dillard's argues that there was insufficient evidence for the jury to conclude that the defendant discriminated against plaintiff willfully or maliciously, which is required for an award of punitive damages under § 1981. *See EEOC v. Gaddis*, 733 F.2d 1373, 1380 (10th Cir.1984). It also asks us to conclude as a matter of law that the punitive damage award is excessive.

(1) Award of Damages

"In the Tenth Circuit, the standard for punitive damages for discrimination in violation of federal civil rights is that the discrimination must have been 'malicious, willful, and in gross disregard of [plaintiff's] rights.'" *Jackson v. Pool Mortgage Co.*, 868 F.2d 1178, 1181 (10th Cir.1989) (quoting *Gaddis*, 733 F.2d at 1380). "'The allowance of such damages inherently involves an evaluation of the nature of the conduct in question, the wisdom of some form of pecuniary punishment, and the advisability of a deterrent. Therefore, the infliction of such damages, and the amount thereof when inflicted, are of necessity within the discretion of the trier of fact.'" *Gaddis*, 733 F.2d at 1390 (internal quotation marks omitted).

Based on the testimony presented, the jury could reasonably find that Dillard's took part in the intentional discriminatory conduct. *See id.* at 1379 (holding that trial

court's finding of intentional discrimination was correct and noting that "[w]here the evidence supports a conclusion either way the choice between two permissible views of the weight of the evidence is not clearly erroneous") (internal quotation marks omitted). The jury found Ms. Hampton's witnesses credible. The jury also weighed testimony regarding the store's training policies, its incident reports, its close observation of African-American customers who were engaging in objectively innocent behavior, and its arrest reports. The jury's findings as a whole are sufficient to establish that the discrimination by Dillard's, acting through Mr. Wilson, was malicious, willful, and in gross disregard of Ms. Hampton's rights. We will not disturb the decision to award punitives.

(2) Amount of Damages

Dillard's also argues that the severity of the punitive damage award violates its constitutional right to due process. "One must receive fair notice both that certain conduct will subject him to punishment, and the possible severity of the punishment that may be imposed." *Deters*, 202 F.3d at 1272 (affirming punitive damage award for sexual harassment claims pursued under Title VII). The Supreme Court has outlined three guideposts to determine whether a defendant has received fair notice. *See BMW of N. Am. v. Gore*, 517 U.S. 559, 574-75, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). "First, and most important, is the reprehensibility of [the] defendant's conduct." *Deters*, 202 F.3d at 1272. Next is the ratio of the punitive damage award to the compensatory damage award. *See id.* at 1272. Third is the measure of the punitive damage award in relation to awards for comparable misconduct. *See id.* We also must keep in mind the deterrent goal of punitive damages in conjunction with the impact the size of the award will have on a defendant and with the wealth and size of the defendant as relevant factors. *See id.*

The availability of punitive damages under § 1981 is well established. *See Johnson v. Railway Express Agency, Inc.*,

421 U.S. 454, 459-60, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975) ("[Section] 1981 affords a federal remedy against discrimination in private employment on the basis of race. An individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages."). Applying the three factors—reprehensibility, ratio, and comparability—to this case, we are unpersuaded by the store's arguments. Dillard's had ample notice it was subject to punitive damages for conduct that was malicious, willful, and in gross disregard of plaintiff's rights.

a. Reprehensibility

Dillard's argues that it is authorized to engage in reasonable loss prevention activity and that, during the five-minute episode, Ms. Hampton was "free to leave" at any time. Aplt's Br. at 46. Dillard's suggests that the reprehensibility of its conduct is further minimized because Ms. Hampton "had shopped at Dillard's hundreds of times, but was stopped only this once." *Id.* Finally, Dillard's purports its surveillance tactics involved no verbal or physical abuse, and thus are inappropriate for punitive damages.

As discussed above, the jury was presented with evidence about the coding and close surveillance of African-American shoppers. The jury must have agreed with Ms. Hampton that the store's surveillance tactics are particularly reprehensible.

b. Ratio

Dillard's next contends that the punitive damages ratio of approximately 20 to 1 is impermissibly excessive and unconstitutionally disproportionate. Dillard's relies primarily on the *BMW* Court's admonitions regarding economic damage cases, where a ratio of 10:1 was cited with approval. *See BMW*, 517 U.S. at 581, 116 S.Ct. 1589 (citing *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460-462,

113 S.Ct. 2711, 125 L.Ed.2d 366 (1993)). Ms. Hampton counters that in cases where "'the injury is hard to detect [and] the monetary value of noneconomic harm . . . [is] difficult to determine,'" a higher ratio of punitive damages to compensatory damages is justified. *Bielicki v. Terminix Int'l Co.*, 225 F.3d 1159, 1166 (10th Cir.2000) (quoting *BMW*, 517 U.S. at 583, 116 S.Ct. 1589).

As stated above, the economic injury suffered here was nominal, but the actual injury is more difficult to quantify. "[B]oth the Supreme Court and this court acknowledge that low awards of compensatory damages may support a higher ratio if a particularly egregious act has resulted in a small amount of economic damages. Additionally, . . . where the injury is primarily personal, a greater ratio [than 10:1] may be appropriate." *Deters*, 202 F.3d at 1273 (citations omitted). Looking at the harm that might result from the store's conduct in relation to the harm that actually occurred, *see BMW*, 517 U.S. at 581, 116 S.Ct. 1589, and eschewing mathematical formulae, *see id.* at 582, 116 S.Ct. 1589, we hold that the punitive damage award in this case is justified. *See United States v. Big D Enters., Inc.*, 184 F.3d 924, 934 (8th Cir.1999) (upholding maximum punitive damages award in Fair Housing Act case and stating that "[t]he punitive damage award in this case . . . reinforces the nation's commitment to protecting and preserving the civil rights of all"); *see also Deters*, 202 F.3d at 1273 (stating that "[w]e are not persuaded that the ratio between compensatory [damages of $5,000] and punitive damages [of $295,000 as adjusted under Title VII] . . . is unconstitutionally disproportionate").

c. Sanctions for Comparable Misconduct

The third prong of inquiry further supports our holding. Section 1981 does not have a statutory cap that limits punitive damages as does Title VII. *See* 42 U.S.C. § 1981a(b)(1). As stated above, few § 1981 claims involve retail transactions, and fewer reach trial. We thus consider whether the award

would "shock the judicial conscience, and constitute a denial of justice." *Deters*, 202 F.3d at 1273 (internal quotation marks omitted). Dillard's does not argue that the award would "result in [its] financial ruin" or that the award is a disproportionally large percentage of its net worth. *Luciano v. Olsten Corp.*, 110 F.3d 210, 221 (2d Cir.1997) (internal quotation marks omitted); *see also Deters*, 202 F.3d at 1273 (affirming punitive damages award with ratio of 59 to 1 in a sexual harassment case); *Big D Enters.*, 184 F.3d at 933 (noting that, in weighing *BMW* factors, "the reprehensibility of [defendant's] conduct more than justifies the punitive damage award"). Because the reprehensibility of the store's conduct as found by the jury was particularly offensive, and the resulting punitive damage award was therefore reasonable, we conclude that the district court did not err in refusing to reduce the punitive damage award.

B. Ms. Cooper's § 1981 Claim

On appeal, Ms. Cooper seeks reversal of the district court's grant of summary judgment to Dillard's on her § 1981 action. She contends that (1) receipt of the coupon from the Dillard's clerk created a promise owed to her; or, alternatively, (2) she is a third-party beneficiary of the contract between Ms. Hampton and Dillard's and, as such, is entitled to redemption of the coupon. She also asserts that the district court improperly resolved credibility and intent issues when it granted summary judgment to Dillard's.

1. Standard of Review

"We review the district court's grant of summary judgment de novo, applying the same legal standard as the court below." *Munoz v. St. Mary-Corwin Hosp.*, 221 F.3d 1160, 1164 (10th Cir.2000). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "In applying this standard, we examine the factual record and draw reasonable inferences therefrom in a light most favorable to the nonmoving party." *Munoz*, 221 F.3d at 1164.

2. The Coupon as a Contract Between Ms. Cooper and Dillard's

We agree with the district court that Ms. Cooper's receipt of the coupon did not establish a contractual relationship between Ms. Cooper and Dillard's. In this regard, we refrain from adopting Amicus Curiae's (Lawyers' Committee for Civil Rights Under Law) expansive interpretation that § 1981 broadens the scope of relevant civil rights and protects customers from harassment upon entering a retail establishment. Although Amicus Curiae proposes an arguable application, § 1981 is limited to remedy "any act of discrimination committed in the making or the performance of a contract." 137 Cong. Rec. S15483 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth). We note that the statute's formulations are not "exhaustive," H.R.Rep. No. 102-40(II), at 37 (1991), and a broader interpretation might discourage intolerable harassment in the retail setting based on unfounded racial biases. But we cannot extend § 1981 beyond the contours of a contract. We are aligned with all the courts that have addressed the issue that there must have been interference with a contract beyond the mere expectation of being treated without discrimination while shopping. *See Morris*, 89 F.3d at 415 (noting that, where claim was interference with prospective contractual relations, "[w]hile the incident . . . was unfortunate and undoubtedly disconcerting and humiliating, it does not constitute a violation of the statutes"); *Wesley*, 42 F.Supp.2d at 1201 (granting summary judgment where there was no evidence "that plaintiff would have attempted to purchase a car from the dealership if the agents had not chased her away"); *Sterling v.*

Kazmierczak, 983 F.Supp. 1186, 1192 (N.D.Ill.1997) (granting defendant's motion to dismiss where plaintiff failed to allege that he was prepared to purchase air rifle cartridges or that he had them "in hand" when confronted by police officer); *Lewis*, 948 F.Supp. at 371 (granting summary judgment to defendants and rejecting theory that an unwritten contract between commercial establishments and the public guarantees that whenever a member of the latter enter "premises of the former [she] will be treated equally regardless of race"); *Robertson*, 848 F.Supp. at 81 (dismissing claim where "plaintiff was not denied admittance or service"); *cf. Bobbitt*, 19 F.Supp.2d at 519 (denying defendant-restaurant's motion to dismiss where plaintiffs alleged that restaurant required plaintiffs to prepay, thereby changing an essential term of the customer/restauranteur contract because of race).

Because there is no dispute as to a material fact regarding Ms. Cooper's failure to make or attempt to make a purchase at Dillard's, we hold that the district court correctly dismissed Ms. Cooper's claims as a matter of law.

3. Third-Party Beneficiary

In the alternative, Ms. Cooper argues that, as the recipient of the purchased clothing and as a part of the shopping party, her receipt of the coupon conferred upon her the status of a third-party beneficiary. We disagree.

"A contract is a stipulation *pour autrui* [for others] if it clearly reveals that the intent of the contracting parties was to provide a benefit to a third party." *Wallace v. Texaco, Inc.*, 681 F.2d 1088, 1090 (5th Cir.1982). Ms. Cooper's presence at the register was fortuitous and, as noted above, her receipt of the coupon from the sales clerk did not dilute Ms. Hampton's § 1981 claim. However, an incidental benefit is not enough to confer contractual rights under the contract; there must also be consideration for the contract. *See id.*

("The benefit to the third party must be more than merely incidental to the contract; it must be part of the condition or consideration for the contract.").

The "[p]erformance of a contract will often benefit a third person. But unless the third person is an intended beneficiary . . . , no duty to him is created." *Restatement (Second) of Contracts*, § 302 cmt. e. An incidental beneficiary is a person who will be benefitted by performance of a promise but who is neither a promisee nor an intended beneficiary. *See Holbrook v. Pitt*, 643 F.2d 1261, 1270 (7th Cir.1981) (noting that, under federal common law, "[i]f the agreement was not intended to benefit the third party, however, he is viewed as an 'incidental' beneficiary, having no legally cognizable rights under the contract").

Undoubtedly, Ms. Cooper, as a third party, derived some benefit from the contract between Ms. Hampton and Dillard's. This derivation of benefit does not, however, automatically render the contract a third-party beneficiary contract, as it reaches beyond the intent of the contracting parties. Ms. Cooper was simply an incidental beneficiary. *See id.* Merely because she may have derived a benefit, purely incidental and not contemplated by the contract between Ms. Hampton and Dillard's, does not entitle her to sue to enforce the contract.

4. Credibility and Intent

Lastly, Ms. Cooper contends that the district court prematurely disposed of her § 1981 claim and her state law false imprisonment claim and made credibility and factual determinations that should have been made by the jury. As to her § 1981 claim, there is no legitimate factual dispute as to whether Ms. Cooper attempted to purchase an item from Dillard's. Because we have held as a matter of law that Ms. Cooper is not a third-party beneficiary of the contract

between Ms. Hampton and Dillard's, her claim as to outstanding credibility determinations raises no material facts.

As to her false imprisonment claim, we agree with the district court that Mr. Wilson's statement to Ms. Hampton that she needed to calm down or he would call the Overland Park Police, does not constitute false imprisonment. *See Thompson v. General Fin. Co.*, 205 Kan. 76, 468 P.2d 269, 280 (1970) (listing elements of false imprisonment claim); *see also Wright v. Montgomery Ward & Co.*, 814 F.Supp. 986, 989 (D.Kan.1993) (discussing false imprisonment under Kansas law). Ms. Cooper has failed to state a claim as a matter of law and we affirm the district court's grant of summary judgment as to all of Ms. Cooper's claims.

III. ANALYSIS OF CASE NO. 98-3306

In a companion case, Dillard's raises two arguments in its effort to overturn the district court's determination that Ms. Hampton was entitled to attorney's fees and expenses in the amount of $141,192.50 pursuant to 42 U.S.C. § 1988. First, Dillard's disputes the district court's conclusion that Ms. Hampton is the "prevailing party" below. Second, Dillard's contends that Ms. Hampton received fees for unrelated and unsuccessful state law and § 1981 claims that were dismissed by the district court. We review the district court's award of attorney's fees and expenses for an abuse of discretion. *See Jane L. v. Bangerter*, 61 F.3d 1505, 1509 (10th Cir. 1995). For the reasons set forth below, we affirm the district court's award.

As to the first argument, because we have determined above that Ms. Hampton prevailed below on her § 1981 claim based upon her rights under the coupon, no further discussion is required. As to the unrelated and/or dismissed claims, Dillard's contends that fees incurred and costs spent in connection with Ms. Hampton's state law false imprisonment claim and Ms. Hampton's dismissed § 1981 claim, as well as

Ms. Cooper's dismissed claims, should not be awarded. We disagree.

> If claims are related, failure on some claims should not preclude full recovery if plaintiff achieves success on a significant, interrelated claim. "Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised."

Id. at 1512 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 440, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). Rather, a court should focus on whether the party "'succeed[ed] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" *Hensley*, 461 U.S. at 433, 103 S.Ct. 1933 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir.1978)).

Here, all of the claims in this case were very similar and stemmed from the same set of facts. "There was . . . one bundle of evidence and there was substantial success for the Plaintiff." *Tidwell v. Fort Howard Corp.*, 989 F.2d 406, 412 (10th Cir.1993). Any consequent fee reduction would be a difficult and unjust division of the hours expended on a claim-by-claim basis. *See Hensley*, 461 U.S. at 435, 103 S.Ct. 1933 ("Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis."). In *Tidwell*, we refused to allow a district court to reduce attorney's fees for a plaintiff who prevailed on an Equal Pay Act claim but failed on her Title VII and state law claims. *See Tidwell*, 989 F.2d at 412-13. We concluded that, instead of following a claim-by-claim success basis, under § 1988 the focus should be on the "significance of the overall relief obtained by [the] plaintiff in relation to the hours reasonably expended on the litigation." *Hensley*, 461 U.S. at 435, 103 S.Ct. 1933; *see also Zuchel v. City & County of Denver*, 997

F.2d 730, 744 (10th Cir.1993) ("[T]he Supreme Court has made clear that when, as here, two claims are interrelated and the plaintiff obtains excellent results on one of those claims, a fully compensatory fee should usually be awarded."). Here, it is undisputed that Ms. Hampton "has obtained excellent results" and as such, her "attorney[s] should recover a fully compensatory fee." *Hensley*, 461 U.S. at 435, 103 S.Ct. 1933. The district court's award of attorney's fees and expenses was well within its discretion.

IV. CONCLUSION

For the reasons stated above we AFFIRM the district court's denial of Dillard's motion for judgment as a matter of law and motion for a new trial; we AFFIRM the district court's award of compensatory and punitive damages; we AFFIRM the district court's grant of summary judgment dismissing Ms. Cooper's claims; and we AFFIRM the district court's award of attorney's fees to Ms. Hampton.

ANDERSON, Circuit Judge, dissenting:

I agree with the majority opinion that the district court correctly dismissed Ms. Cooper's claims against Dillard. However, because I believe that no § 1981 violation occurred in connection with Ms. Hampton's interaction with Dillard employees either, I would reverse the district court's denial of Dillard's motion for judgment as a matter of law and overturn the jury verdict in favor of Ms. Hampton.

I realize that we do not lightly overturn jury verdicts. We may only do so if "there is no legally sufficient evidentiary basis . . . with respect to a claim." *Harolds Stores, Inc. v. Dillard Dep't Stores, Inc.*, 82 F.3d 1533, 1546 (10th Cir.1996). I believe Dillard has met that burden in this case. I therefore respectfully dissent.

I assume for the sake of argument that the coupon is a benefit or privilege of Ms. Hampton's contractual relationship with Dillard. Bearing in mind that § 1981 requires purposeful and discriminatory conduct, there is absolutely *no* evidence that Mr. Wilson intentionally interfered with her redemption of that coupon when he approached her and Ms. Cooper, based upon probable cause to suspect that Ms. Cooper had shoplifted, and asked to look in Ms. Hampton's bag at a location near the store exit.

Indeed, there is no evidence that, when Mr. Wilson approached Ms. Hampton and Ms. Cooper and asked to examine the shopping bag, he *even knew* that they were redeeming fragrance coupons. When questioned about the incident at trial, Mr. Wilson testified as follows:

> Q: What did you think Paula Hampton and Demetria Cooper were doing when you approached them?
>
> A: They were getting ready to exit the Dillard's store to go out into the mall.
>
> Q: Okay. Did you notice that they were speaking with a cosmetic associate or a fragrance consultant when you approached the two ladies?

A: No, I did not.

Q: Did you knowingly prevent Paula Hampton from receiving a free cologne sample?

A: No, I did not.

Q: Did you intend to interfere with Paula Hampton obtaining a free sample of cologne on April 5th, 1996?

A: No.

Q: Did you have any desire to prevent Paula Hampton from obtaining a free sample of cologne on April 5th, 1996?

A: No, I did not.

Q: Did Ms. Hampton ever tell you that you interfered with her receiving a free sample of cologne on that date, April 5th, 1996?

A: No, she did not.

Wilson test., Dillard App. Vol. 3 at 634. Plaintiffs produced no—absolutely zero—evidence to refute Mr. Wilson's testimony on that point and there is nothing in this record showing that he intended to interfere with their redemption of the fragrance coupons. And while the majority correctly notes that credibility determinations are within the jury's province, I note that the district court, in concluding Mr. Wilson had probable cause to suspect plaintiffs of shoplifting, specifically stated that plaintiffs "cite no evidence which seriously calls into question . . . Wilson's credibility." *Hampton v. Dillard Dep't Stores, Inc.*, 985 F.Supp. 1055, 1061 (D.Kan.1997). Nothing in Ms. Hampton's or Ms. Cooper's testimony remotely suggests that Mr. Wilson's conduct towards them indicated an intention to prevent either plaintiff from redeeming the fragrance coupons. All the evidence in this case points one way only: that Mr. Wilson's interference with Ms. Hampton's redemption of her fragrance coupon was purely fortuitous, incidental and completely collateral to the only thing Mr. Wilson intentionally did—i.e., stop and question Ms. Hampton and Ms. Cooper briefly

before they left the store because he had probable cause to believe one of them had shoplifted merchandise.

My conclusion is further supported by the fact that there is no evidence that either Mr. Wilson's or plaintiffs' conduct, or Ms. Hampton's damages arising from her encounter with Mr. Wilson, would have been different in any way had Ms. Hampton already received her fragrance sample. There is no evidence that anything at all in this case would have been different had Mr. Wilson intercepted plaintiffs before, during or after they redeemed their fragrance coupons. In other words, all the evidence indicates that it was the wrongful accusation of shoplifting, not the denial of her free fragrance sample, which caused Ms. Hampton's alleged injuries. But § 1981 does not provide a remedy for the wrongful accusation of shoplifting, absent some interference with a contract benefit.

Further, the interference with the contract benefit (the fragrance coupon in this case) must be racially motivated. The majority acknowledges that discriminatory surveillance, while reprehensible, is not itself actionable under § 1981. Thus, to succeed on her § 1981 action in this case, Ms. Hampton must prove that Mr. Wilson's interference with her redemption of the fragrance coupon was itself racially motivated. My review of the record reveals no legally sufficient evidence of such racial motivation in Mr. Wilson's interaction with Ms. Hampton. Even if the original surveillance of plaintiffs was race-based, any claim that Mr. Wilson's stop and questioning of them was race-based is utterly inconsistent with the district court's specific finding, amply supported by the evidence in this case, that Mr. Wilson had probable cause to stop and question them. The existence of probable cause was a wholly sufficient reason to stop the plaintiffs.[1]

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[1] Indeed, there is no evidence that Dillard security personnel, or Mr. Wilson, treated white customers about whom they had probable cause to suspect shoplifting any differently than they treated black customers.

Additionally, there was no evidence surrounding the particulars of the stop that suggests Mr. Wilson stopped and questioned plaintiffs on the basis of race. There is no evidence that Mr. Wilson made any racially derogatory remarks or acted or conducted himself in any way which suggested that he was preventing plaintiffs from redeeming their fragrance coupons because they were African-American. There is no evidence that he had *ever* said or done anything suggesting he was racist or treated African-Americans differently from white customers. Indeed, there is no evidence that he handled this particular investigation into shoplifting any differently from any other shoplifting investigation involving any other store patrons, of any racial background. Ms. Hampton herself testified that she had frequently shopped at Dillard, had made numerous purchases there without incident, and there was absolutely no evidence that Dillard in any way had ever discouraged her, or wished to discourage her, from patronizing its store.

In sum, Ms. Hampton's § 1981 claim hangs on the thread that the free fragrance coupon given to her following her purchase was a benefit of her contractual relationship with Dillard, and that Mr. Wilson, intentionally and with discriminatory animus, interfered with her redemption of that coupon. Because the evidence in this case clearly demonstrates that any interference by Mr. Wilson with Ms. Hampton's coupon redemption was completely unintentional, accidental, and in no way based upon her race, but only resulted from the fortuity that the fragrance counter was near a store exit, I would find that there is no legally sufficient evidence supporting the jury's verdict in favor of Ms. Hampton.

APPENDIX B

UNITED STATES DISTRICT COURT
D. KANSAS

No. CIV.A. 97-2182-KHV.

PAULA DARLENE HAMPTON,
Plaintiff,

v.

DILLARD DEPARTMENT STORES, INC.,
Defendant.

Aug. 27, 1998

MEMORANDUM AND ORDER

VRATIL, District Judge.

Plaintiff Paula Hampton filed suit against Dillard Department Stores, Inc. ("Dillard's"), alleging that as part of Dillard's pattern and practice, its security officer, Tom Wilson, discriminated against her on the basis of race in violation of 42 U.S.C. § 1981.[1] Specifically, plaintiff claimed that Dillard's deprived her of her right to enjoy all benefits, privileges, terms and conditions of her contractual relationship with Dillard's. After a four day trial, the jury returned a verdict in favor of plaintiff, awarding $56,000 in compensatory damages and $1,100,000 in punitive damages. The

[1] Hampton also alleged that Wilson falsely imprisoned her in violation of Kansas law, but the Court granted summary judgment for Dillard's on this claim. Demetria Cooper, plaintiff's niece, joined in the complaint. The Court granted summary judgment for Dillard's on all of her claims. *See* 985 F.Supp. 1055, 1061 (D.Kan.1997), and *Minute Order Dismissing All Claims Of Plaintiff Cooper* (Doc. # 146).

Court entered judgment in accordance with the verdict. The matter now comes before the Court on defendant's *Motion For Judgment As A Matter Of Law, Or Alternatively For A New Trial Or Remittitur* (Doc. # 150) filed December 19, 1997.

Judgment As A Matter Of Law Standards

Judgment as a matter of law under Rule 50(b) "should be cautiously and sparingly granted." *Zuchel v. City and County of Denver*, 997 F.2d 730, 734 (10th Cir.1993). The Court must affirm the jury's verdict if "viewing the record in the light most favorable to [the nonmoving party], there is evidence upon which the jury could properly return a verdict for [the nonmoving party.]" *Harolds Stores, Inc. v. Dillard Dep't Stores, Inc.*, 82 F.3d 1533, 1546 (10th Cir.1996). The Court does not "weigh the evidence, pass on the credibility of the witnesses, or substitute [its] conclusions for that of the jury." *Id.* The Court must enter judgment as a matter of law in favor of the moving party, however, if "there is no legally sufficient evidentiary basis . . . with respect to a claim or defense . . . under the controlling law." *Id.* at 1546-47 (quoting Fed.R.Civ.P. 50(a)). A legally sufficient basis requires more than a "scintilla of evidence" favoring the nonmoving party. *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547 (10th Cir.1988).

New Trial Standards

The decision to grant a motion for new trial is committed to the trial court's sound discretion. *See Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186, 1194 (10th Cir.1997). In considering a motion for new trial, the Court must view the evidence in the light most favorable to the prevailing party. *See Joyce v. Davis*, 539 F.2d 1262 (10th Cir.1976); *Neyman v. United Telecomm., Inc.*, 1992 WL 97808, Case No. 90-2033 (D. Kan. April 7, 1992), *aff'd*, 1 F.3d 1249 (10th Cir.1993). "[T]he party seeking to set aside a jury verdict

must demonstrate trial errors which constitute prejudicial error or that the verdict is not based on substantial evidence." *White v. Conoco, Inc.*, 710 F.2d 1442, 1443 (10th Cir.1983). The Court should "exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984) (further quotation and citation omitted).

Evidentiary Standards

"Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Fed. R. Evid. 103; *see also Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1518 (10th Cir.1995) ("error in the admission or exclusion of evidence is harmless if it does not affect the substantial rights of the parties, and the burden of demonstrating that substantial rights were affected rests with the party asserting error") (further quotations and citation omitted). A new trial should be granted, however, when the erroneous admission of evidence affected the substantial rights of the parties. *See* Fed.R.Civ.P. 61.

Jury Instruction Standards

The decision whether to give a particular jury instruction is within the sound discretion of the Court. The instructions as a whole must provide correct statements of the governing law and provide the jury with an ample understanding of the issues and applicable legal standards. *Allen v. Minnstar*, 97 F.3d 1365, 1368 (10th Cir.1996). The question is not "whether the charge was faultless in every particular, but whether the jury was misled in any way and whether it had understanding of the issues and its duties to determine these issues." *Mason v. Oklahoma Turnpike Auth.*, 115 F.3d 1442, 1454 (10th Cir.1997) (further quotations and citations omitted).

Factual Background

The Court first briefly summarizes the facts in this case, reserving a more detailed description of the evidence for later discussion of specific issues raised by Dillard's:

Plaintiff, an African-American woman, was shopping for an Easter outfit for her infant nephew on Good Friday, April 5, 1996. She, her niece Demetria Cooper, and four children went to the Dillard's store in Overland Park, Kansas, for this purpose. Shortly after they entered the store, Tom Wilson, a Dillard's security officer, took notice. He observed them for more than 15 minutes. He then asked fellow employee Pam Fitzgerel to continue the surveillance in a fitting room in the children's department, where plaintiffs were trying clothing on Cooper's one-year-old son. At trial, Fitzgerel claimed that Cooper was holding a rolled-up cloth item in the fitting room; that she later saw an item under Cooper's jacket; and that she therefore contacted Wilson and told him that she was positive that Cooper had put something under her coat.

The group left the fitting room. Plaintiff purchased an outfit for Cooper's son and when she did so, the sales associate gave plaintiff and Cooper coupons which were redeemable at the fragrance counter for cologne samples. Plaintiff's party then ventured to the fragrance counter, which is located at the nexus of Dillard's and the Oak Park Mall, to redeem their fragrance coupons. *See Hampton v. Dillard Dep't Stores, Inc.*, 985 F.Supp. 1055, 1057 (D.Kan.1997). Wilson interrupted plaintiff, however, as she was redeeming her coupon and talking with fragrance consultant Betty Chouteau. Wilson asked to look inside the Dillard's bag and emptied the contents on the fragrance counter. Wilson checked the items and the receipt, which matched. During this exchange plaintiff became upset and told Wilson that she did not appreciate being accused of shoplifting, that she spent a lot of money at Dillard's and that she did not deserve to be treated this way. Wilson told her to calm down or he would

call the Overland Park police and have her removed from the store. Plaintiff asked Wilson his name and the location of the customer service counter. She proceeded to the customer service counter and had no more contact with Wilson.

At trial, plaintiffs presented evidence that Dillard's had a pattern and practice of subjecting African-American shoppers to disparate security practices, and argued that Wilson's surveillance, stop, detention and search were a part of that pattern and practice.

ANALYSIS

Dillard's asserts that it is entitled to judgment as a matter of law because plaintiff produced legally insufficient evidence that (1) she received a coupon for free cologne as a benefit or privilege of the contractual relationship; (2) Dillard's intentionally interfered with plaintiff's right to redeem the coupon; and (3) Dillard's intentionally discriminated against plaintiff on the basis of race. Alternatively, Dillard's asserts it is entitled to a new trial because (1) bifurcation of the contract issue and the discrimination issue prejudiced its right to a fair trial; (2) the Court erred in admitting numerous items of evidence; (3) the Court erred in instructing the jury; and (4) the damage award demonstrated passion and prejudice. Finally, Dillard's asserts that the evidence did not warrant submission of the punitive damages award to the jury or, if it did, that the amount of the compensatory and punitive damages demonstrates passion and prejudice and thus Dillard's is entitled to a new trial or remittitur.

I. Judgment As A Matter Of Law

Dillard's asserts that plaintiff did not produce legally sufficient evidence to support her § 1981 claim, which required proof that (1) plaintiff was a member of a racial minority; (2) Dillard's had an intent to discriminate on the basis of race; and (3) the discrimination concerned one or

more of the activities enumerated in the statute. *Morris v. Office Max, Inc.*, 89 F.3d 411, 413 (7th Cir.1996). Dillard's contends that it is entitled to judgment as a matter of law because plaintiff failed to produce evidence on the second and third elements of her claim.

A. Benefit Of Contractual Relationship Under § 1981

Dillard's first asserts that a coupon for a free cologne sample is not a contract interest which is sufficient to warrant protection under 42 U.S.C. § 1981. That statute provides in part that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981. "[T]he term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship" *Id.* § 1981(b). Dillard's asserts that as a matter of law the coupon for a free cologne sample was not a benefit of a contractual relationship.

Dillard's correctly points out that "the law of contracts is confined to promises that the law will *enforce*" and that "[c]ourts have generally been unwilling to enforce a promise unless the promisee has given the promisor something in return for it." Defendant's Memorandum in Support at 4, citing E. Allan Farnsworth, *Contracts*, § 1.1, at 4 (1982) (emphasis in original). In this case the bargained-for exchange was plaintiff's money in return for Dillard's Easter outfit; the consideration was money and clothing. Dillard's

contends that § 1981 protects only the performance of the terms of a contract, and that because the free coupon was not part of the bargained-for exchange in this case, it was a gratuitous promise and was not enforceable.

Section 1981, however, as amended by the Civil Rights Act of 1991, specifically provides that "the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the *enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.*" *Id.* § 1981(b) (emphasis added). This language provides that once a contractual relationship exists, a benefit or privilege of that relationship may not be withheld based on the race of one party to the contract—even if the benefit or consideration was not the consideration for the contract. *Cf. Morris v. Office Max, Inc.*, 89 F.3d 411, 414 (7th Cir.1996) (allegation of interference with "prospective contractual relations" does not state claim under § 1981; plaintiffs failed to "allege actual loss of a contract interest."). Thus, although in this case the free sample was not part of the bargained-for exchange, it could be a privilege or benefit of the contractual relationship. The question then becomes whether plaintiff presented sufficient evidence that the coupon was a privilege or benefit of the contractual relationship.

Dillard's cites testimony by witnesses who suggested that coupons were indiscriminately doled out to customers who had not made purchases, and argues that such evidence demonstrates that the coupons were not a privilege or benefit of a purchase. Only one of these witnesses testified about the coupon promotion on the date in question, however, and she testified that the coupons were given both to those who made purchases and to some who did not. Dillard's asserts that plaintiff presented no evidence that would support an inference that the coupons were a privilege or benefit of a purchase. This argument is rebutted by the testimony of

plaintiff and Cooper, who both testified that although they were in the store for over an hour, they saw no one who was freely distributing fragrance coupons. Plaintiff and Cooper testified that neither one of them received a coupon until after plaintiff made a purchase.[2]

Plaintiff's argument is not discredited by the fact that Cooper received a coupon but bought nothing. Plaintiff's purchase was for Cooper's child, Cooper was part of plaintiff's shopping party, and the jury reasonably could have concluded that as a benefit of plaintiff's contractual relationship with Dillard's, plaintiff and her companion received coupons for free fragrance samples. Nor is plaintiff's argument discredited by the fact that other customers, of unidentified race and identity, received coupons without purchases. Whatever may have been the circumstance for other customers, the jury was entitled to find on this evidence that the fragrance coupons were a benefit of plaintiff's contractual relationship with Dillard's. Based on the evidence of record, the Court can not determine otherwise as a matter of law.

B. Intentional Interference With Contract Benefit

Dillard's asserts that as a matter of law, even if the coupon was a benefit of plaintiff's contractual relationship, Wilson did not intentionally interfere with her right to redeem the coupon. Dillard's points out that the Court sustained its

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[2] Plaintiff testified that her sales associate told her that she was entitled to a free gift because she had made a purchase. I Tr. Trans. at 122. Dillard's objected to this testimony as hearsay, and the Court instructed the jury that it could not be taken for the truth of the matter asserted. The statement, however, was admissible as non-hearsay because it was offered as an admission by a party-opponent under Fed.R.Evid. 801(d)(2)(D) (statement offered against a party that is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship").

summary judgment motion on plaintiff's claim of false imprisonment and that in doing so it held that Wilson did not hold plaintiff against her will; that even if he had restrained plaintiff's liberty, he had probable cause to detain her on suspicion of shoplifting; and that plaintiffs therefore failed to create a jury question on the false imprisonment claim. Dillard's argument incorrectly assumes that because Wilson's actions were privileged under state law, he could not have interfered with plaintiff's right to redeem her coupon for a free fragrance sample. The record will reflect that the trial was bifurcated and that the first phase of trial dealt only with factual questions whether the coupon was a benefit or privilege of the parties' contractual relationship and whether Wilson interfered with plaintiff's attempt to obtain that benefit or privilege. The Court has already addressed the first question. As to the second, plaintiff and Cooper both testified that plaintiff was in the process of redeeming her coupon when Wilson stopped Cooper, who was carrying the Dillard's bag which contained plaintiff's purchase. Betty Chouteau, the perfume consultant, also testified that plaintiff was redeeming the coupon when Wilson intervened.[3] Based on these circumstances, the jury could reasonably conclude that Wilson intended to interfere with plaintiff's redemption of the coupon. Thus plaintiff produced legally sufficient evidence that Wilson intentionally interfered with her redemption of the coupon.

C. Intentional Racial Discrimination

Dillard's asserts it is entitled to judgment as a matter of law on plaintiff's § 1981 claim because in granting Dillard's

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[3] Chouteau testified that she had given plaintiff the sample when Wilson interrupted their conversation, but she also testified that she was not certain whether plaintiff took the free sample or what she did with it if she took the sample. I Tr. Trans. 119.

summary judgment on the false imprisonment claim the Court found that Wilson had probable cause to stop plaintiff. Dillard's argues that even if Wilson interfered with plaintiff's contractual right by conducting an investigative stop, he had a legally sufficient excuse because he reasonably believed that Cooper was attempting to steal from Dillard's. Dillard's argues that this legal excuse is a legitimate nondiscriminatory reason for the stop. It then asserts that plaintiff can not show that the stop was a pretext because the Court ruled on summary judgment that Wilson had probable cause to stop her and that plaintiff had no direct evidence of discrimination.

Plaintiff could carry the burden to show that Dillard's discriminated on the basis of race "either directly by proving [defendant] acted with a discriminatory motive" or "indirectly by showing that [defendant]'s proffered reasons are pretextual."[4] *Elmore v. Capstan, Inc.*, 58 F.3d 525, 530 (10th Cir.1995) (further citations and quotations omitted). "In the final analysis, the [trier of fact] is required to weigh all the evidence and to assess the credibility of witnesses in order to determine whether the plaintiff was the victim of intentional discrimination based upon protected class characteristics." *EEOC v. Flasher*, 986 F.2d 1312, 1317 (10th Cir.1992). The ultimate determination of "whether there was intentional discrimination against a protected class is considered a question of fact." *Id.*

Dillard's asserts that plaintiff offered no evidence at trial to support a conclusion that Dillard's had any motivation to intentionally deprive her of the benefit of the free perfume sample due to her race. Dillard's fails to appreciate, however,

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[4] Defendant also asserts that the Court abused its discretion by allowing plaintiff to introduce evidence which attacked Wilson's credibility after it held, on summary judgment, that his deposition testimony was credible. The credibility of a witness is always an issue at trial, however, even if summary judgment was based in part on a finding that the witness was credible. *See* Fed.R.Evid. 608.

that discriminatory animus may be inferred from the simple showing of pretext. As the Tenth Circuit noted:

> [A] showing of pretext is evidence which allows a jury to infer discriminatory intent. Consequently, because a jury may find illegal discrimination upon nothing more than a prima facie case and pretext, such a showing at the summary judgment stage is sufficient to get the case to the jury. This conclusion flows directly from the Supreme Court's analysis in *St. Mary's Honor Ctr. [v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)*]*, where the Court observed that "rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination." *Id.*, 509 U.S. at 510-11, 113 S.Ct. at 2749. The Supreme Court had issued a similar ruling earlier in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) when it said that a plaintiff may satisfy her "ultimate burden of persuading the court that she has been a victim of intentional discrimination . . . by showing that an employer's proffered explanation is unworthy of credence." *Id.* at 256, 101 S.Ct. at 1095.

Randle v. City of Aurora, 69 F.3d 441, 451 (10th Cir.1995) (footnote omitted) ("if this inferential evidence is sufficient to allow a plaintiff to prevail at trial, it is surely sufficient to permit a plaintiff to avoid summary judgment so that the plaintiff can get to trial."). In this case, after a full trial on the merits the burden-shifting *McDonnell Douglas* analysis has dropped out, leaving the "single overarching issue whether plaintiff adduced sufficient evidence" to warrant the jury's determination that Wilson intentionally discriminated against plaintiff on the basis of her race. *See Fallis v. Kerr-McGee Corp.*, 944 F.2d 743, 744 (10th Cir.1991).

Dillard's asserts that the Court conclusively determined at summary judgment that Wilson had probable cause to detain

plaintiffs, and contends that the Court erred in refusing to instruct the jury that it had so ruled. *See* Fed.R.Civ.P. 56(d) ("court should make an order specifying the facts that appear without substantial controversy"; and "[u]pon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly."). The Court granted summary judgment on plaintiff's false imprisonment claims because on the summary judgment record it found that Dillard's had produced unrefuted evidence that Wilson had probable cause to stop plaintiff. *See Hampton*, 985 F.Supp. at 1061. The Court stated as follows:

> In this case . . . plaintiffs fail to identify material questions of fact which prevent summary judgment on the issue of probable cause.
>
> While plaintiffs argue that a jury issue exists as to Wilson's credibility, they cite no evidence which seriously calls into question either Wilson's credibility or that of Fitzgerel—who independently observed Cooper in the fitting room. In the circumstances, plaintiff's evidence, taken together, is insufficient to establish a reasonable inference that Wilson's testimony is unworthy of belief.

Id.

Although Dillard's correctly notes that Rule 56(d) "empowers a court to specify (and set to one side) facts that are without substantial controversy, the rule nevertheless 'permits the court to retain full power to make one complete adjudication on all aspects of the case when the proper time arrives.'" *Colasanto v. Life Ins. Co. of N. Am.*, 100 F.3d 203, 210 (1st Cir.1996) (quoting 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2737 (2d ed.1983)). "An order granting a judgment on certain issues is a judgment on those issues. It forecloses further dispute on those issues at the trial stage. An order denying a motion for partial summary judgment, on

the other hand, is merely a judge's determination that genuine issues of material fact exist. It is not a judgment, and does not foreclose trial on the issues on which summary judgment was sought. It does not settle or even tentatively decide anything about the merits of the claim." *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564, 1573 (Fed. Cir.1986) (further quotation omitted). In the instant case the Court did not grant Dillard's summary judgment motion on plaintiff's § 1981 claim, and the Court's probable cause finding at summary judgment was not determinative of the § 1981 claim.

Dillard's argument also is based upon the faulty premise that if Wilson had probable cause to stop plaintiff, that probable cause could not be a pretext for discrimination. *See, e.g., Tanner v. Heise*, 879 F.2d 572, 580 n. 5 (9th Cir.1989) ("mere compliance" with state law did not shield police from liability if plaintiff could prove officers were motivated to arrest him as harassment for religious beliefs); *Johnson v. Morel*, 876 F.2d 477, 479 (5th Cir.1989) (viable equal protection claim where officer humiliated plaintiff on basis of race during lawful arrest). It ignores the fact that probable cause may clearly be a pretext for discrimination when security officers detain only *minority* shoplifting suspects while letting their majority counterparts tend freely to shoplifting business. It further ignores the fact that probable cause, which implicates an objective inquiry, and lack of discriminatory intent, which is an inherently subjective topic of inquiry, are not fungible concepts. Probable cause does not mean lack of discriminatory intent any more than lack of probable cause means racially-based animus.

Dillard's also argues that plaintiff produced no direct evidence of discrimination. Dillard's notes that Wilson used no racial epithets during the incident. Although such evidence may support a finding of discriminatory intent, it is not required. *Cf. DeNovellis v. Shalala*, 124 F.3d 298, 301 (1st Cir.1997) (Title VII discrimination may involve racial

slurs or other types of racially motivated harassment). Dillards also contends that plaintiff produced no evidence that it instructed Wilson to target African-American shoppers or that Wilson was racist in his treatment of shoppers or in his work as a Kansas Highway Patrolman.

Dillard's argument misses the mark. In *Hall v. Pennsylvania State Police*, 570 F.2d 86 (3d Cir.1978), plaintiff sued a bank and several state officials, alleging that pursuant to a racially inspired policy of photographing "suspicious" black men and women, defendants photographed him when he entered the bank. The Third Circuit found that the plaintiff's § 1981 claim survived a motion to dismiss for these reasons:

> Section 1981 obligates commercial enterprises to extend the same treatment to contractual customers "as is enjoyed by white citizens." Here, plaintiff asserts that upon entering the premises to transact business, his photograph was taken for the police by bank employees pursuant to a racially based surveillance scheme. He received disparate, and because it was based on race, disparaging treatment for which the record offers no justification.
>
> This was not the isolated act of an individual employee, but rather the implementation of a policy deliberately adopted by the bank management to offer its services under different terms dependent on race.

Hall, 570 F.2d at 92.

"The issue of intent . . . is one that is often not susceptible to direct proof, and a court should consider all conflicting inferences that may be presented by the circumstantial evidence in the case." *Washington v. Duty Free Shoppers, Ltd.*, 710 F.Supp. 1288, 1289 (N.D.Ca.1988), citing *Rogers v. Lodge*, 458 U.S. 613, 618, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982). A plaintiff may present a variety of types of evidence

to establish that defendant's stated reasons for its actions were pretextual. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Statistical data showing defendant's pattern of conduct toward a protected class can support an inference that defendant discriminated against individual members of the class. *See Fallis v. Kerr-McGee Corp.*, 944 F.2d 743, 746 (10th Cir.1991) (employer's pattern of conduct can create inference that employer discriminated against plaintiff); *cf. Lewis v. J.C. Penney Co.*, 948 F.Supp. 367, 372 (D.Del.1996) (black woman who alleged § 1982 violation based on claim she was falsely accused of shoplifting did not allege or produce facts suggesting store had discriminatory policy; also did not allege interference with contract).

Plaintiff presented evidence that Dillard's employees routinely targeted and investigated African-Americans as shoplifting suspects. Two former Dillard's security officers, Michael R. Imber and David Cole, testified that they resigned from Dillard's, in part, because of its discriminatory practices. *See* II Tr. Trans. 208, 239-40. Further, though security officers told management that they were concerned about racial discrimination by Dillard's, Dillard's took no action to address these concerns. *See* II Tr. Trans. 245, 262. Plaintiff also presented testimony that through race codes, Dillard's targeted black customers (but not white customers) when they entered the store. II Tr. Trans. 211, 239-40, 259-60. Imber also testified that from 1991 through 1994, when he was a field supervisor for the Overland Park Police Department, he was instructed to oversee officers dispatched to a Dillard's shoplifting arrest because of the police department's concern about "bad arrests" at Dillard's. II Tr. Trans. 213-15. Imber also testified to his opinion, based on his experience after April, 1994, that Dillard's "preyed on" and targeted African-American shoppers. *Id.* Plaintiff also presented testimony that store incident reports identified shoppers by race and by no other characteristics, and that in

contrast to their white counterparts, African-American shoppers were written up for "suspicious" activity such as returning merchandise without a receipt.

Plaintiff presented evidence that Wilson placed her under surveillance shortly after she entered the store. Wilson's incident report reflected the practice of using racial identifiers for those who engaged in suspicious activities.[5] The record therefore contained evidence that Wilson targeted plaintiff and her niece at least in part because of this discriminatory practice, and that in so doing Wilson interfered with plaintiff's enjoyment of a benefit of her contractual relationship with Dillard's in violation of § 1981. The Court therefore overrules Dillard's motion for judgment as a matter of law.

II. Motion for New Trial

As an alternative to its motion for judgment as a matter of law, Dillard's moves for a new trial or remittitur.

A. Bifurcation

One day before trial, the Court decided sua sponte to bifurcate the trial. Although Dillard's did not object, it now asserts that bifurcation was prejudicial.[6] "The court, in

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[5] The "Dillard's Security Report" which Wilson completed included a space for the race of each subject. The narrative part began with Wilson's statement that he was "watching two black females with two kids and a stroller." It explained that "[t]he black female that had on a dark leather coat [had a pair of pants]" and that "[t]he other black female left the area with the children." Wilson used the term "black female" twelve times in the 1 1/2 page hand-written report. Plaintiff's Trial Ex 5.

[6] *See Defendant's Reply To Plaintiff's Memorandum in Opposition To Motion For Judgment As A Matter Of Law, Or Alternatively For New Trial Or Remittitur*, Exhibit A, Transcript of Telephone Conference, Dec. 3, 1997 11; 12-14. Dillard's did state that it would object to "any argumentative voir dire on race as potentially tainting the jury on these simple issues." *Id.* at 20.

furtherance of convenience or to avoid prejudice, or when separate trials will be conductive to expedition and economy, may order a separate trial of any claim, . . . or of any separate issue." Fed.R.Civ.P. 42(b). "Only one of these criteria need be met to justify bifurcation," and "Rule 42(b) places the decision to bifurcate within the discretion of the district court. The rule clearly suggests that a court may bifurcate a trial on its own motion. A decision ordering bifurcation is dependent on the facts and circumstances of each case." *Saxion v. Titan-C-Manufacturing, Inc.*, 86 F.3d 553 (6th Cir.1996) (internal citations and quotations omitted).

In this case, it was clear before trial that the issue of race discrimination was entirely severable from the narrow and technical issues whether the fragrance coupon was a benefit or privilege of the contractual relationship and whether Wilson intentionally interfered with plaintiff's exercise of that privilege. Negative findings on these narrow threshold questions could have rendered moot the remaining evidence of discrimination—which constituted the vast majority of the evidence to be presented at trial. Dillard's now asserts, however, that the issues were not clearly separable and that by dividing the issues of "intentional interference" and "discrimination," the Court lowered plaintiff's burden of proof. The second phase of the trial, however, required the jury to find that Dillard's intentionally discriminated against plaintiff because of her race. The circumstances met the Rule 42 need for economy, and thus bifurcation was not an abuse of discretion.

Dillard's also argues that several prejudicial aspects of bifurcation entitle it to a new trial. First, Dillard's states that after empaneling the jury, the Court told the jurors that this was an important race discrimination case with a lot at stake, and suggested that the first phase of the trial was only a stepping stone to be endured before getting to the heart of the

case.[7] This argument mischaracterizes the Court's comments. In introducing the case, the Court stated that "[t]his is a race discrimination case." I Tr. Trans. at 13. After briefly summarizing the parties' theories, it described the expected length of trial, stated that "[t]his is an important case to the parties," and added that "the lawyers and their clients have a lot at stake." *Id.* at 14. This introduction to the case was not "highly prejudicial and misleading," and it did not encourage the jury to find for plaintiff in phase one out of a sense that it would be only fair to hear the entire case.

Dillard's also complains that in the first phase of trial, when plaintiff's counsel made a comment about a "wrongful stop," the Court refused to instruct the jury that as a matter of law, Wilson had probable cause to detain plaintiff. The Court did instruct the jury that "the officer's motivation for stopping the plaintiff and her party has nothing to do with what you're going to decide at this part of the trial, so you can ignore everything concerning his motives and why he might have stopped them." *Id.* at 181. The jury instructions in the first phase clearly instructed the jury to consider the narrow

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[7] This comment was part of the stock preliminary instructions which the Court gives as it introduces the voir dire process at beginning of each trial. As in other cases, the Court told the jury that the case had been on file for a long time, that the case was an important one to both the parties and the attorneys, who both had a lot at stake, and that they were entitled to a fair jury to decide the issues of fact presented. *See* I Tr. Trans. at 14.

Dillard's also states that on a radio talk show on December 28, 1997, the jury foreperson stated that the Court led the jury to believe the case should have been settled. The Court did not hear that broadcast, and it is not aware that it made any statements before or after trial which communicated any such opinion to the jury. Certainly the Court's comments during voir dire suggest nothing about the Court's views on settlement. If the jury foreperson based her alleged comment on statements which are not contained on the record, the comments had to have been made to the jury after it had returned its verdict. The Court did not discuss the case with any juror, except as reflected on the record, prior to that time.

questions before it. Absent evidence to the contrary, the Court assumes that the jurors followed the instructions. *See Shamrock Drilling Fluids, Inc. v. Miller*, 32 F.3d 455, 460 (10th Cir.1994).

B. Evidentiary Rulings

Dillard's next asserts that the Court erred in admitting certain evidence and excluding other evidence. Under Federal Rule of Evidence 401, "relevant evidence is that which has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1518 (10th Cir.1995) (quoting Fed.R.Evid. 401.) "The Rule's basic standard of relevance thus is a liberal one." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). "[E]rror in the admission or exclusion of evidence is harmless if it does not affect the substantial rights of the parties, and the burden of demonstrating that substantial rights were affected rests with the party asserting error." *Gomez*, 50 F.3d at 1518.

Dillard's contends that it is entitled to a new trial because "the bulk of the evidence produced by plaintiff at trial was unrelated to Officer Wilson, plaintiff, or the time period when the alleged intentional discrimination took place." *Memorandum In Support Of Defendant's Motion* at 16. This is a sweeping argument, one which is difficult to analyze because Dillard's motion largely fails to cite the relevant trial record on this issue. Based on Dillard's pre-trial and post-trial motions, however, along with the trial record, the Court will address the claims of evidentiary errors with as much specificity as possible.

Before trial, Dillard's filed a motion in limine to exclude "all speculative or conclusory testimony and evidence alleging without factual foundation that defendant is racist as

well as other irrelevant testimo[illegible]" Doc. # 81. Dillard's asserted that plaintiff should [illegible]pine that it had racist practices because such testimony lacked the factual foundation required by Rule 701 for lay opinion testimony. Dillard's further argued that lay opinion evidence of alleged racism should be excluded because it was not relevant and even if relevant, that its probative value did not outweigh its prejudicial effect. *See* Fed.R.Evid. 401, 402, 403.

Lay opinion testimony is admissible when it is "(a) rationally based on the perception of the witness," and (b) "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Fed.R.Evid. 701. The fact that lay opinion bears on an ultimate issue in the case does not render it inadmissible. *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 911 (2d Cir.1997).

At a hearing on the motion, the Court first ruled that under Fed.R.Evid. 701, lay witnesses could testify concerning an opinion that a Dillard's employee treated them in a racist manner if the opinion was based on personal experience. Doc. # 149 at 27-28. The Court expressed concern, however, about putting time limits on this sort of "anecdotal evidence." *Id.* at 28. In response, plaintiff asserted that for at least nine years before her incident, security guards and employees at Dillard's focused upon African-Americans in a discriminatory manner, that such practices had been passed on to new employees as part of their on-the-job training, and that such evidence was relevant because it proved a continuing policy and practice. *Id.* at 29; 37. The Court stated:

> [i]t seems to me there [are] two issues. One is, did Dillard's have a pattern and practice, and, number two, if they did, were Wilson and Pam Fitzgerel implementing that pattern and practice when they had an encounter with these plaintiffs. Because even if they had a pattern and practice, if these people weren't following the

> pattern, that doesn't get you anywhere. They have to have an intent to discriminate.
>
> And so what is it about the facts of this case that links these two individuals with this so-called practice and pattern?

Id. at 34.

In a lengthy colloquy, plaintiff responded that she could tie Wilson's actions [8] to the alleged pattern and practice because he had received on-the-job training during his employment. *Id.* at 36. The Court acknowledged that Wilson's own training would be relevant but questioned the relevancy of evidence regarding the training of guards who had no connection with plaintiff. *Id.* at 37.

Plaintiff pointed to the practice of calling security codes when African-American customers entered the store, watching them, following them, and stopping them more often than white customers. The Court responded "[w]hat you're talking about is pattern and practice evidence. Again, we're talking about two separate things. But . . . we are not going to have a parade of people through who are going to say that I went to Dillard's and I wasn't treated right as a customer or I was wrongfully arrested." *Id.* at 43. After further discussion, the Court stated that

> [I]t's not material whether Dillard's had a pattern and practice unless you can show Wilson and Pam Fitzgerel were acting pursuant to that when they had their encounters with plaintiffs in this case. And so I think it's a reasonable limitation to restrict the scope of the

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[8] Plaintiff noted that while Wilson claimed that his attention had been drawn to plaintiff because of her nephew's baby stroller and because Cooper looked suspicious, plaintiff contended that in fact Wilson's attention was drawn to them because of the long-standing pattern and practice of super-surveillance of African-Americans. Plaintiff pointed out that Wilson's credibility would be crucial on this issue.

> evidence to events which occurred . . . on or after the time that Wilson started working there. That would be as to 404(b) acts of discrimination.
>
> If you want to put in evidence about training or lack of training, you know, specific policies, I am not meaning to tie your hands on that at all. But that would be my ruling on the defendant's motion in limine. And if you can lay a foundation for evidence beyond that at trial, then you need to approach the bench and we'll hash that out outside the jury's hearing.

Id. at 52.

Dillard's asserts that the Court abused its discretion in allowing opinion testimony about alleged discrimination as far back as the late 1980's, while not allowing evidence of specific discriminatory acts. The Court's ruling allowed for plaintiff to establish a foundation for Rule 701 lay opinion testimony while limiting the potential for prejudice under Rule 404(b). For example, a guard who testified that he worked at Dillard's for years has shown enough personal knowledge to rationally testify that based on his observations, African-Americans were targeted for more surveillance than whites. Further, the Court did allow evidence of specific incidents involving targeting of African-Americans, even before Wilson was employed. These incidents were relevant to show a pattern and practice where plaintiff produced evidence of the continuity of management from the time of that incident to the time Wilson was trained. The Court balanced the need for a foundation for lay opinion testimony with the need to exclude evidence of prior acts under 404(b) [9]

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[9] Under Rule 404(b): "(1) the evidence must be offered for a proper purpose; (2) the evidence must be relevant; (3) the trial court must make a Rule 403 determination of whether the probative value of the similar acts is substantially outweighed by its potential for unfair prejudice; and (4) pursuant to Fed.R.Evid. 105, upon request, the trial court shall instruct the jury that the evidence of similar acts is to be considered only for the

unless offered for a proper purpose. To the extent that witnesses were allowed to testify under Rule 701, the Court allowed enough testimony to establish a foundation for the lay opinions. Further, a review of the trial transcript indicates that most of the testimony to which Dillard's objected was properly admitted.[10] This evidence included:

1. Michael Imber's testimony that he quit his security job at Dillard's because he "didn't like the way that Dillard's, some of the associates and security personnel treated black customers." II Tr. Trans. 208. The Court admitted this evidence under Rule 701, finding that it would be relevant and helpful to the jury. The Court allowed Imber to testify that he spoke to management about his concerns. *Id.* at 208-209. This evidence was relevant to the training issue, and it demonstrated that management knew about potential race discrimination. On cross-examination, Imber admitted that "generally speaking" he did not think Dillard's is discriminatory. *Id.* at 219-220. On further cross-xamination, Imber testified that he resigned before Wilson began working for Dillard's, *id.* at 216, and that he had never heard any complaints about how Wilson treated African-Americans.

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proper purpose for which it was admitted." *United States v. Meacham*, 115 F.3d 1488, 1494 (10th Cir.1997) (citing *Huddleston v. United States*, 485 U.S. 681, 691-92, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988)). In this case, evidence of prior incidents of targeting African-Americans was relevant to show motive, intent, and knowledge of Dillard's. The probative value of this evidence was not substantially outweighed by its potential for unfair prejudice, and Dillard's did not request a limiting instruction. Evidence of the incidents of targeting African-Americans was also admissible under Fed.R.Evid. 406 to show the routine practice of Dillard's.

[10] In its motion for judgment as a matter of law, Dillard's does not predicate its claim of error on "general testimony" or "prior incidents" which are specifically identified in the trial record.

2. Testimony by David Cole, who worked as a security guard for Dillard's in 1990 and 1991. Cole testified he quit his job, in part because sales associates routinely reported black customers coming into the store and asked him to follow them for no reason. *Id.* at 239. The Court allowed this testimony as relevant to the policy and practice of Dillard's. *Id.* at 238.

3. Testimony by Darrold Conrad, who was employed as a security guard at Dillard's from 1986 through early 1992. *Id.* at 243. Conrad testified that he reported to Dillard's management, including Rodgers and operations manager Marva ("Marvie") Dirks, that he was sometimes called to investigate matters concerning minority customers who in his opinion had been stereotyped as shoplifters. *Id.* at 244-45. This testimony was relevant to show the knowledge of Dillard's management.

4. Testimony by Gregory Powell, a Dillard's security guard who worked from 1987 to 1994. Powell testified that on many occasions African-Americans were closely watched while white customers were allowed to freely engage in similar behavior. *Id.* at 261. He told Dirks that training in this area would be helpful. Again, this testimony was relevant to the knowledge of Dillard's management and to the lack of training.

5. Testimony by Byron Pierce, a security officer with Dillard's from 1990 to 1992 and again in 1997. Pierce testified that he has been called to investigate African-American customers more frequently than white customers. III Tr. 468. He also testified that in mid-to-late 1997, he was working plain clothes security and received a call reporting that a black man was walking around the store. It soon dawned on him that he was the subject of the report, even though he had done nothing suspicious. *Id.* at 469. Pierce also testified about an incident in which a Dillard's security officer without probable cause took clothing from an African-

American shopper who had gone to her car, and told her she could not have it back unless she produced a receipt. *Id.* at 474. This testimony related for the most part to the time period during which Wilson worked, and was relevant to the pattern and practice of Dillard's in targeting African-American shoppers.

6. Testimony from Sondra Samuels that when she was shopping at Dillard's in the fall of 1997, she was followed throughout the entire time she shopped. *Id.* 483. She was dressed in a business suit and she was not carrying any bags, but Samuels testified that she believed she was followed because she was black. *Id.* at 485. She also testified that when she called management about the incident she received no apology. *Id.* at 489. This testimony was relevant to show the knowledge of Dillard's management concerning the security practices at the time Wilson was employed at Dillard's.

For the most part, plaintiff tied the challenged testimony of such witnesses to recent policy and practice at Dillard's and/or management's knowledge of discrimination and failure to train security guards and other employees on this issue.[11] *Cf. Swanson v. General Servs. Admin.*, 110 F.3d 1180, 1186 (5th Cir.) (without testimony of circumstances, or "without examples of blacks who were scrutinized while similarly-situated whites were not," conclusory statements that blacks were closely "watched" in employment setting

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[11] The testimony of Geraldine Jones is another area of possible dispute. Jones testified that she worked as a security guard at Dillard's from 1987 to 1990, under store manager Jack Rodgers. *Id.* 229. Rodgers was still manager at the time relevant to this case, and plaintiff tried to question Jones about whether she had ever discussed with Marvie Dirks, the operations manager at the Oak Park store, how Dillard's treated African-American customers. The Court sustained Dillard's objection as to relevancy, however, and there is no basis for error in Jones' testimony. The Court does not discuss it further. *Id.* at 231.

were incompetent to establish pattern of discrimination), *cert. denied*, — U.S. —, 118 S.Ct. 366, 139 L.Ed.2d 284 (1997). Cole's testimony, however, concerned events well beyond the two-year limit the Court originally set for specific incidents, and it was perhaps not closely tied to current policy and practice or management knowledge. Given all of the testimony which was properly admitted in this case, however, it could not have affected the substantial rights of Dillard's. Further, the record reflects that even if the Court erred in excluding evidence of some specific acts while allowing general conclusions based on those acts, Dillard's was allowed to effectively cross-examine these witnesses about their conclusions and the grounds for them.

The Court next addresses Dillard's assertion that the Court abused its discretion because it admitted without sufficient foundation lay testimony that Wilson was racist. Specifically, Cooper testified that she believed Wilson's acts were racist because he was "snotty." II Tr. Trans. 302. Plaintiff also testified that she believed Wilson had stopped her because she was black, based on her observation that he appeared angry, was "red in the face," and "his whole attitude was how dare you question me this way." II Tr. Trans. 325. These observations may be compatible with a race-based animus, but there is little foundation for these two witnesses' testimony that Wilson harbored racial animus toward them. *Cf. Alexis v. McDonald's Restaurants of Mass., Inc.*, 67 F.3d 341, 347 (1st Cir.1995) (witnesses' inferred racial animus based on personal observations that person was "unfriendly" acted "angrily," etc.; although observations compatible with race-based animus, no foundation for such an inference). Although the credibility of the opinion testimony and the weight to be given it are questions for the jury, *see Brown v. McGraw-Edison Co.*, 736 F.2d 609, 616 (10th Cir.1984), the Court perhaps erred admitting this lay opinion evidence. By itself, however, the erroneous receipt of such evidence does

not entitle Dillard's to a new trial. Dillard's cross-examined both witnesses extensively on this testimony and whether they had a rational basis for their opinions. Given the abundant independent evidence regarding Dillard's treatment of minority shoppers, the Court is certain that the self-serving testimony of plaintiff and Cooper on this issue had no material effect on the jury.

Dillard's also attacks admission of evidence that it characterizes as "rumor" regarding the scheduling of security officers. This evidence dealt with the fact that according to Imber and Powell, Dillard's started to schedule work shifts for security officers based in part on how many people they apprehended. This change was a factor in Imber's decision to quit, and plaintiff asserts that it was admissible as an exception to the hearsay rule. *See* Fed.R.Evid. 803(1). In any event, operations manager Dirks testified that she compiles her schedule for security officers based in part upon their effectiveness as officers, including the number of apprehensions. This evidence was admissible and in any event could not have affected the substantial rights of Dillard's.

Dillard's next asserts that the Court improperly allowed plaintiff to impeach Wilson with evidence of incidents of untruthfulness, one of which occurred over 20 years ago. Under Fed.R.Evid. 608, specific instances of past misconduct that is probative of a witnesses' character for truthfulness may be the subject of inquiry on cross-examination, although it may not be proved by extrinsic evidence. The rule gives the Court discretion and does not include a recency requirement. Although the recency is certainly a factor which the jury may consider, the Court did not abuse its discretion in allowing plaintiff to inquire of Wilson about an incident in which he was suspended for filing an erroneous leave report. Evidence of an allegation of an incident in 1995 for which

Wilson was ultimately cleared was also not erroneously admitted. The jury heard Wilson's explanation and could give it appropriate weight.

Dillard's next asserts that the Court erred in admitting statistical evidence of the race of persons involved in arrests and other incidents. Several witnesses, including Dirks and other Dillard's employees, testified concerning the incident log which included racial codes from which plaintiff gleaned damning statistical evidence. Dillard's asserts that the statistical evidence was more unfairly prejudicial than probative, and argues that this evidence had no relevance to the question whether Wilson intentionally discriminated against plaintiff by interfering with her ability to redeem her free fragrance coupon. Dillard's also contends that the Court erred in admitting the Security Incident Log, Ex. 3, the History of Arrests Document, Ex. 6, and the Compilation of Data from History of Arrests, Ex. 7, because these exhibits were prejudicial and misleading.[12] The Court disagrees. This

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[12] Ironically, plaintiff had originally intended to offer only summaries of these exhibits to demonstrate that African-American shoppers were stopped at a rate that was disproportionate to their representation in the pool of shoppers at the Dillard's store in the Oak Park Mall. Defendant strenuously objected to this statistical method of proof, and to make her point, plaintiff was forced to prepare a large demonstrative exhibit in the courtroom, plodding through each exhibit and tallying the reported racial composition of the suspicious shoppers at defendant's store. This water-torture method of proof, which consumed many hours, actually redounded to plaintiff's benefit because the jury thereby learned much more than the sterile statistical information which was the purpose of plaintiff's exercise. For one thing, the jury learned the astoundingly innocuous nature of conduct which Dillard's viewed as "suspicious" when committed by minority shoppers—whether black, hispanic, or otherwise. For example, the entries on the log included "two black females in dresses [department]," II Tr. Trans. at 360; "four black males and one black female made purchase and left without incident," *id.* at 365; "two groups of black females in better dresses [department]," III Tr. Trans. 394; and "two black females walking around with a list of some kind." *Id.* at 401.

evidence was indirect evidence that Dillard's had a corporate policy which targeted African-American and other minority shoppers for security purposes.

Dillard's next argues that the Court erred in refusing to admit plaintiff's exhibit 15, a statement which plaintiff gave about the incident on April 5, 1996. Dillard's offered this exhibit as an admission against interest, Fed.R.Evid. 801(d)(2), to show that in her initial statement plaintiff did not allege that the incident was racially motivated. Even if it [sic] the Court erred in excluding this statement, plaintiff admitted on cross-examination that she did not initially tell the store manager that she believed the incident was racially motivated; thus Dillard's was not prejudiced by any error.

Dillard's next contends that the Court erred in allowing plaintiff's counsel to read from Chouteau's statement in cross-examining Dirks. Dillards alleges that this allowed plaintiff to use hearsay testimony without Dillard's being able to cross-examine Chouteau. Plaintiff points out that Dillard's had made much of the fact that on the day of the incident, plaintiff did not claim that it was racially motivated. Dirks had testified that she had read the reports, including Chouteau's report, and that she found in them no claim of race discrimination. Thus, it was proper for plaintiff to use the statement to cross-examine Dirks.

Finally, Dillard's asserts that the Court erred in allowing plaintiff to offer rebuttal testimony that Daryl Hayes, a Dillard's employee, used the "'N' word" while working for Oak Park Mall Security in the early 1990's. Plaintiff contends such testimony was proper rebuttal evidence under Fed.R.Evid. 613(b) because Hayes had denied ever using the word and Dillard's could have recalled him as a witness. Plaintiff points out that Fed.R.Evid. 608(b) does not preclude rebuttal evidence if offered to show that a statement made on direct examination is false, even if that statement is

collateral. *See United States v. Fleming*, 19 F.3d 1325, 1331 (10th Cir.1994). Dillard's counters that it was not rebuttal evidence because it merely contradicted evidence raised by plaintiff on cross-examination. The Court first notes that according to plaintiff's proffer, the tendered testimony was that Hayes used this word *while working for Dillard's*. This proffer turned out to be in error. Though the Court recognizes that this testimony raised a potential for prejudice, evidence that Dillard's employees demonstrated racial animus was relevant to the case. Further, any error in admitting this evidence as rebuttal evidence is not a basis for a new trial.

Dillard's has failed to show that evidentiary errors entitle it to a new trial.

C. Jury Instructions

Dillard's asserts that jury instructions 10 and 17 were contradictory and misleading. Instruction 10 was given after the first phase of the trial, and provided in part that plaintiff

> claims [Dillard's] violated her civil rights under 42 U.S.C. § 1981 by intentionally denying her the right to enjoy all benefits and privileges of her contractual relationship with Dillard's, on account of her race. More specifically, plaintiff contends that [Dillard's] intentionally prevented her from redeeming a free cologne sample which Dillard's had given her as a benefit of a purchase in its children's department.

Doc. # 139. Instruction 17 was given after the second phase of the case, and stated that plaintiff

> claims that [Dillard's] violated her civil rights under 42 U.S.C. § 1981 by intentionally denying her the right to enjoy all benefits and privileges of her contractual relationship with Dillard's on account of her race. More specifically, plaintiff contends that Dillard's surveillance, detention and search of her belongings constituted

> a security practice which unequally burdened her as an African-American shopper.

Doc. # 142. Dillard's correctly points out that this last sentence quoted from Instruction 17 suggests an implied contract claim, and that claim was disposed of on summary judgment. But Instruction 17 set forth nothing more than plaintiff's claim. Instruction 18 specifically set out the elements of plaintiff's § 1981 claim at trial. Further, although Dillard's suggests otherwise, Instruction 18 states that in order to prove that her race was a motivating factor in Dillard's conduct, plaintiff had the burden of proving that "but for its unlawful motive, defendant would not have denied plaintiff the right to enjoy the benefits and privileges of her purchase." Taken as a whole, these and the other instructions provided a correct statement of the law and provided the jury an ample understanding of the issues and applicable legal standards. *See Allen v. Minnstar*, 97 F.3d 1365, 1368 (10th Cir.1996).

D. Sufficiency of the Evidence

Dillard's argues that it is entitled to a new trial because the jury verdict with respect to liability, compensatory damages and punitive damages was contrary to the clear weight of authority. A new trial is not warranted unless the verdict was "clearly, decidedly, or overwhelmingly" against the weight of the evidence. *May v. Interstate Moving & Storage Co.*, 739 F.2d 521, 525 (10th Cir.1984).

The Court emphatically rejects Dillard' [sic] argument that the evidence in this case was not sufficient to support the verdict. Plaintiff was an extremely credible witness. Some of Dillard's witnesses, including Wilson in particular and to a lesser extent Dirks, were not similarly credible. Because the weight of the evidence was in plaintiff's favor, the reasons detailed by the Court in denying Dillard's motion for judgment as a matter of law apply here and clearly support the jury's verdict.

III. Judgment As A Matter Of Law on Punitive Damages

Dillard's next argues that it is entitled to judgment as a matter of law because the evidence was insufficient to submit plaintiff's punitive damages claim to the jury. Punitive damages may be imposed in civil rights cases only if the discrimination was "'malicious, willful, and in gross disregard of [plaintiff's] rights.'" *Fitzgerald v. Mountain States Tel. & Tel. Co.*, 68 F.3d 1257, 1263 (10th Cir.1995) (quoting *Jackson v. Pool Mortgage Co.*, 868 F.2d 1178, 1181 (10th Cir.1989)) (further quotations and citations omitted.).

Dillard's first asserts that in determining whether to award punitive damages the jury could properly consider only Wilson's conduct on this occasion, and not the prior incidents of alleged discrimination by Dillard's employees. Dillards [sic] points out that Wilson stopped plaintiff for less than five minutes and used no racial epithets. Further, although the jury did not learn of this finding, Dillard's notes that the Court found that Wilson had probable cause to stop plaintiff and search the shopping bag. Dillard's argues that if Wilson had a legal right to stop plaintiff, such a finding is inconsistent with a finding of malice or gross disregard. The Court has already ruled that it properly kept from the jury its ruling on probable cause. Once the case went to the jury, the whole issue of Wilson's credibility was before it. The Court has observed that Wilson was not a credible witness, and the jury obviously agreed.[13]

Dillard's also asserts that plaintiff's theory was based solely on the alleged actions of Wilson, and that liability could be imputed to Dillard's only under the doctrine of

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[13] The jury's assessment of Wilson's credibility was manifest in its verdict in phase one of the trial—before the jury heard any of the allegedly inflammatory evidence regarding racially-based treatment of minority shoppers. If the jury did not believe Wilson's testimony regarding where he detained plaintiff, it is no surprise that it rejected his testimony on the highly consequential subject of discriminatory intent.

respondeat superior. Dillard's cites *Fitzgerald* for the assertion that in order to hold Dillard's liable for punitive damages based on the actions of one of its employees, the agent must have the authority to "exercise control, discretion and independent judgment over a certain area of [the] business with some power to set policy for the company." *Fitzgerald*, 68 F.3d at 1263. In *Fitzgerald*, the Tenth Circuit noted that any intentional discriminatory conduct occurred "at the hands of [defendant's employee], not [the corporate defendant]," and then found that the employee had no managerial authority necessary to impute liability to the corporation. *See id.* at 1263-64 (although employee had some authority over employment decisions, she had insufficient power or control over an area of the business and no power to set company policy). In this case, Wilson did not have the authority to set policy. But here, contrary to Dillard's assertions, there was ample evidence that the act of selectively targeting Africa-Americans was authorized by Dirks and Rodgers, as managerial agents for Dillard's. In *Fitzgerald*, plaintiff did not "adequately present[ ] a theory of independent liability" against the corporation on the inadequacy of their investigation. Here, plaintiff presented substantial evidence that Dillard's knew about and ratified a policy of targeting African-Americans, and that Wilson carried out that policy.

IV. New Trial or Remittitur on Damages

Dillard's argues that the amount of the total damage award demonstrates passion or prejudice, and that a new trial is required. Plainly excessive damages may support an inference that passion or prejudice contributed to the jury's award. *Fitzgerald*, 68 F.3d 1257, 1262. But "absent an award so excessive as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the

jury's determination of the damages is considered inviolate." *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1168 (10th Cir.1981) (en banc).

A. Compensatory Damages

Dillard's asserts that a compensatory damage award of $56,000 is excessive. The Court agrees with Dillard's assertion that because the value of the free cologne sample was negligible, the compensatory award must be premised in large part on plaintiff's evidence of emotional injury. But the Court rejects Dillard's further assertion that plaintiff's testimony about her mental suffering was insufficient as a matter of law to justify the compensatory damages award. In *Patterson v. P.H.P Healthcare Corp.*, 90 F.3d 927, 939 (5th Cir.1996), the Fifth Circuit found that a $40,000 award for emotional distress was not sufficiently supported by plaintiff's testimony that he felt "frustrated," "real bad," "hurt," and "angry." The Fifth Circuit holding was based on the fact that plaintiff did not present evidence with specificity and the record contained no evidence that he suffered from "sleeplessness, anxiety or depression." In contrast, in this case plaintiff gave eloquent and emotionally moving testimony that Wilson disgraced and humiliated her, in front of her children, that she was too emotionally distraught to drive, and that she had to call her husband for a ride home. II Tr. Trans. 326-27. Immediately after the incident she was crying and she was so upset that she could not write out a customer comment card, and a Dillard's employee filled it out for her. *Id.* at 337. She testified that "I don't feel that my life will ever be the same." *Id.* at 328. The jury was entitled to credit this testimony and to compensate plaintiff accordingly.

As noted in *Patterson*, "the harm is subjective and evaluation of it depends considerably on the demeanor of witnesses." In this case, plaintiff's testimony and demeanor left the Court with a firm conviction that plaintiff suffered genuine injury which vastly transcended the apparently trivial

value of any free fragrance sample and the more substantial insult of Dillard's refusal to apologize. Plaintiff's testimony was eminently credible. Having observed the witnesses and heard the evidence, the Court can not say that the actual damage award was based on improper passion and prejudice.

B. New Trial on Punitive Damages

Dillard's also asserts that the punitive damage award was excessive and requires a new trial. In so arguing, Dillard's again raises the same evidentiary and jury instruction issues raised before. The Court has found, however, that any trial errors did not affect the substantial rights of the parties. Thus they do not require reversal of the punitive damages award. Further, the alleged fact that the foreperson approached plaintiff after the verdict and kissed her on the forehead is not evidence of passion and prejudice.

C. Constitutionality of Punitive Damages Award

Relying on *BMW of N. Am. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), Dillard's asserts that the punitive damages award of $1,100,000 violated the due process clause of the United States Constitution. In *Gore*, the Supreme Court struck down a punitive damages award of $2,000,000 where plaintiff's purely economic injuries were $4,000. The Supreme Court found that the punitive damages award, which had been reduced from $4,000,000 on appeal to the Alabama Supreme Court, violated the Fourteenth Amendment substantive due process clause. In this case, in federal court, Dillard's claim is a Fifth Amendment substantive due process challenge. The Court need not address how the fact that this is a Fifth Amendment rather than a Fourteenth Amendment claim might affect the analysis,[14] because this case is distinguishable from *Gore* on many fronts.

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[14] Federal courts have suggested that the Fifth Amendment due process protection would apply "equally to the review of punitive damages

In *Continental Trend Resources v. OXY, Inc.*, 101 F.3d 634 (10th Cir.1996), on remand in light of *Gore*, the Tenth Circuit reduced from $30,000,000 to $6,000,000 a punitive damages award for tortious interference with contract and prospective business advantage. In that case the jury had awarded $269,000 in actual damages. In that context the Tenth Circuit interpreted *Gore* as follows.

First, the punitive damage award must relate to conduct occurring within the state. *Continental Trend*, 101 F.3d at 636-37. This factor does not weigh in favor of remittitur because this is a federal case.[15] *Cf. Gore*, 116 S.Ct. at 1604 (state jury increased punitive damage award based on conduct outside state, which conduct was legal where it occurred; award thus infringed on policy choices of other states).

Second, defendant must receive "fair notice . . . of the conduct that will subject [defendant] to punishment." *Continental Trend*, 101 F.3d at 638 (quoting *Gore*, 116 S.Ct. at 1598.) "[S]ection 1981 . . . has always authorized the recovery of compensatory and punitive damages." *Carter v. Sedgwick County*, 36 F.3d 952, 955 (10th Cir.1994). Thus this factor does not weigh in favor of a remittitur.

Third, defendant must receive "fair notice . . . of the severity of the penalty" that may be imposed. 116 S.Ct. at 1598. The Supreme Court set out three "guideposts" for this requirement: "(1) the degree of reprehensibility of the defendant's conduct, (2) the ratio of the punitive award to the actual harm inflicted on plaintiff, and (3) the comparison

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awarded in federal court." *Lee v. Edwards*, 101 F.3d at 809 n. 2 (2d Cir.1996).

[15] Even if the jury considered conduct outside the state, in this federal civil rights case that would not be objectionable. *See Deters v. Equifax Credit Info. Servs., Inc.*, 981 F.Supp. 1381, 1389 (D.Kan.1997) (the federalism concerns expressed in *Gore* have no bearing on the analysis in a purely federal case).

between the punitive award and the civil or criminal penalties that could be imposed for comparable misconduct." *Continental Trend*, 101 F.3d at 638; *Gore*, 116 S.Ct. at 1598-1603. In this case, the degree of reprehensibility is assuredly higher than defendant's conduct in *Gore* (repainting a car before selling it). *See McKnight v. Circuit City Stores, Inc.*, 1997 WL 328638, at *7 (E.D.Va. March 12, 1997). The ratio of punitive damages to harm inflicted (about 20 to 1) may be high but as the Supreme Court noted, "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." 101 F.3d at 639, quoting *Gore*, 116 S.Ct. at 1602. Both examples apply in this case. Also, the 20 to 1 ratio here does not in itself violate due process. *See, e.g., Deters v. Equifax Info. Servs.*, 981 F.Supp. 1381 (D.Kan. 1997) (hostile environment sexual harassment; jury awarded $5,000 in compensatory and $1,000,000 in punitives; court amended judgment for punitives to bring total damages within statutory cap and found $295,000 punitives did not violate substantive due process);

Additionally, the Tenth Circuit has noted that a substantial punitive award may be required to "influence the behavior of a prosperous corporation." *Continental Trend*, 101 F.3d at 641. The Court acknowledges the Supreme Court's note that caution must be exercised in considering the size of a defendant, but adds that to a large degree that caution is based upon a concern that state courts not unduly burden interstate commerce. *See Continental Trend*, 101 F.3d at 641, citing *Gore*, 116 S.Ct. at 1604. Such a concern is not relevant to a federal civil rights case such as this.

Finally, this case is different from cases like *Gore* and *Continental Trend*, which ordered remittiturs in cases involving "mere economic damages." *Deters*, 981 F.Supp. at 1391 (citing *Federal Deposit Insurance Corporation v. Hamilton*, 122 F.3d 854, 861-62 (10th Cir.1997); *Continental Trend*, 101 F.3d at 638; *Gore*, 116 S.Ct. at 1599.) Rather, it involves personal injury and emotional damages. The punitive damage award in this case, though large, is not unjustly so. It does not violate substantive due process. Dillard's motion for a remittitur on this basis is denied.

IT IS THEREFORE ORDERED that Dillard's *Motion for Judgment As A Matter of Law, Or Alternately For A New Trial Or Remittitur*, (Doc. # 150) filed December 19, 1997 be and hereby is OVERRULED.

APPENDIX C

UNITED STATES DISTRICT COURT,
D. KANSAS.

No. CIV.A. 97-2182-KHV.

PAULA DARLENE HAMPTON and DEMETRIA COOPER,
Plaintiffs,

v.

DILLARD DEPARTMENT STORES, INC.,
Defendant.

Nov. 25, 1997.

MEMORANDUM AND ORDER

VRATIL, District Judge.

Plaintiffs Paula Hampton and Demetria Cooper seek damages for acts committed by Dillard Department Stores, Inc. ("Dillard's"), through its security officer Tom Wilson. Specifically, plaintiffs claim that Wilson discriminated against them on the basis of race, in violation of 42 U.S.C. § 1981, by depriving them of their right to make, perform, modify and terminate a contract and to enjoy all benefits, privileges, terms and conditions of their contractual relationship with Dillard's. Plaintiffs also claim that Wilson falsely imprisoned them in violation of Kansas law. This matter comes before the Court on *Defendant's Motion For Summary Judgment* (Doc. # 67) filed September 24, 1997. For the reasons stated more fully below, the Court finds that defendant's motion should be sustained.

Summary Judgment Standards

Rule 56(c) of the Federal Rules of Civil Procedure directs the entry of summary judgment in favor of the party who "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A principal purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). The court's inquiry is to determine "whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Entry of summary judgment is mandated, after an adequate time for discovery and upon motion, against a party who fails to make a showing to establish the existence of an element essential to that party's case, and on which that party bears the burden of proof at trial. *Meredith v. Beech Aircraft Corp.*, 18 F.3d 890, 893 (10th Cir.1994). Summary judgment is inappropriate, however, if there is sufficient evidence on which a trier of fact could reasonably find for the nonmoving party. *Prenalta Corp. v. Colorado Interstate Gas Co.*, 944 F.2d 677, 684 (10th Cir.1991).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact by informing the court of the basis for its motion. *Martin v. Nannie and the Newborns, Inc.*, 3 F.3d 1410, 1414 (10th Cir.1993). This burden, however, does not require the moving party to "support its motion with affidavits or other similar materials *negating* the opponent's claim." *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2552 (emphasis in original). Once the moving party properly supports its motion, the nonmoving party may not rest upon mere allegation or denials of his or her

pleadings, "but must set forth specific facts showing that there is a genuine issue for trial." *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir.1993). The court reviews the evidence in a light most favorable to the nonmoving party, *e.g., Thrasher v. B & B Chem., Co., Inc.*, 2 F.3d 995, 996 (10th Cir.1993), under the substantive law and the evidentiary burden applicable to the particular claim. *Anderson*, 477 U.S. at 255, 106 S.Ct. at 2513.

Summary judgment is appropriate unless there is a genuine issue of material fact—meaning that a "reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 256, 106 S.Ct. at 2514.

Factual Background

The following material facts are undisputed or, where disputed, are viewed in the light most favorable to plaintiffs:

Plaintiffs are African-American females. On April 5, 1996, they were shopping for Cooper's son in the children's department of Dillard's store in Overland Park, Kansas. Plaintiffs had four children with them—an infant, a one-year-old and two seven-year-olds. Dillard's plain-clothed security officer, Tom Wilson, noticed plaintiffs in the children's department and began watching them. Wilson particularly watched Cooper, who had a rolled-up dark cloth item in her hand. Wilson saw Cooper looking toward the ceiling and looking around, which he interpreted as checking to see if someone was watching. When plaintiffs entered a fitting room, Wilson asked Pam Fitzgerel, another Dillard's employee, to watch plaintiffs in the fitting room. Fitzgerel could see into plaintiffs' fitting room because the door was open. Fitzgerel saw Cooper push a rolled-up cloth item into her jacket and reported her observation to Wilson, stating at least twice that she was "positive" she had observed Cooper putting something underneath her coat. When they left the fitting room, plaintiffs went to an open cash register and

Hampton purchased an outfit for Cooper's son. In return for the purchase Dillard's gave plaintiffs coupons for men's cologne samples, redeemable at the men's fragrance counter. Plaintiffs then proceeded to the fragrance and cosmetics area, which is located at the nexus where Dillard's meets the mall.

Wilson interrupted plaintiffs while they were redeeming the cologne samples from fragrance consultant Betty Chouteau. Wilson informed plaintiffs that someone had observed Cooper placing something blue underneath her coat. While in the children's department Cooper had handled two pieces of blue merchandise. Hampton purchased one of them, and Cooper gave the other to one of the children to return to the store display. Cooper had also carried her son's coat.

Wilson told plaintiffs that he needed to look inside their Dillard's bag.[1] He compared the receipt to the merchandise in the bag and found that it matched. Hampton told Wilson that she did not appreciate being accused of shoplifting and that she spent a great deal of money at Dillard's and did not deserve to be treated "this way." Hampton was upset and raised her voice. Wilson told Hampton to calm down or he would call the Overland Park Police and have plaintiffs removed from the store. Wilson did not suggest that he would call the police to investigate the alleged shoplifting. Nor did he physically touch plaintiffs, arrest them, or use any racial epithets or derogatory remarks to or about them.

Wilson "shoved" the bag and merchandise at Hampton, remarking "that's fine." Plaintiffs did not attempt to redeem the fragrance coupons after the encounter because, according

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[1] Hampton understood that Wilson was a Dillard's security officer after his first comments to them. Cooper was not initially aware of Wilson's identity and, in fact, believed he could be a "pervert." Cooper finally understood Wilson's identity near the end of the encounter when he gave Hampton his name and title.

to Hampton, "it wasn't a concern to her." Instead, plaintiffs proceeded to customer service to complain about Wilson. Wilson did not follow plaintiffs to the customer service department. No more than five minutes elapsed between the time Wilson approached plaintiffs at the fragrance counter and the time he returned their property to them.

Plaintiffs argue that Dillard's had a pattern and practice of subjecting African-American shoppers to disparate security practices, and that Wilson's surveillance, stop, detention and search were part of that pattern and practice. In support of this position, plaintiffs offer deposition testimony from past and present security officers who testify that African-American shoppers are treated differently than white shoppers; that sales associates identify them as shoplifting suspects with no articulated basis other than race and presence in a particular department; and that African-American shoppers have complained to store management about racially discriminatory treatment of this kind.

Analysis

A. Race Discrimination under 42 U.S.C. § 1981

Litigation under Section 1981 most commonly involves the right to make and enforce contracts of employment; claims involving retail transactions are infrequent. *See Morris v. Office Max, Inc.*, 89 F.3d 411, 413 (7th Cir.1996), and cases cited therein. Section 1981 addresses racial discrimination in contractual relationships. As amended by the Civil Rights Act of 1991, it provides as follows:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . .
>
> (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance,

> modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981(a)-(c).

For summary judgment purposes, Section 1981 claims are analyzed under the burden-shifting scheme originally developed under Title VII in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See Thomas v. Denny's Inc.*, 111 F.3d 1506, 1509-10 (10th Cir.1997) (elements of plaintiff's case and allocation of burdens same under Title VII and Section 1981). Under the *McDonnell Douglas* framework, plaintiffs first must establish a prima facie case of discrimination. Accordingly, plaintiffs must demonstrate that (1) they are members of a racial minority; (2) defendant had an intent to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the statute (i .e., the making and enforcing of a contract).[2] *See Morris*, 89 F.3d at

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[2] Defendant asserts that plaintiffs must meet a four part test: (1) that they are members of a protected class; (2) that they attempted to contract for certain services; (3) that they were denied the right to contract for those services; and (4) that such services remained available to others outside the protected class. *See White v. Denny's, Inc.*, 918 F.Supp. 1418, 1424 (D.Colo.1996). The Court finds that the three part test set forth above is the correct standard because evidence regarding the treatment of others outside the protected group is not present in every case of discrimination. Where similarly situated non-protected individuals are present, however, disparate treatment may give rise to an inference of discrimination. *See Rawlins-Roa v. United Way*, 977 F.Supp. 1101, 1105 n. 2 (D.Kan.1997). Moreover, the elements of a prima facie case are flexible and are not intended to be rigidly applied. *See Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 530 n. 2 (10th Cir.1994).

413; *Green v. State Bar of Texas*, 27 F.3d 1083, 1086 (5th Cir.1994); *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir.1993); *Lewis v. J.C. Penney Co., Inc.*, 948 F.Supp. 367, 371 (D.Del.1996).

Plaintiffs claim that Wilson's actions (1) deprived them of their right to make, perform, modify and terminate a contract, and (2) violated their right to enjoy all benefits, privileges, terms and conditions of their contractual relationship with Dillard's. With regard to the first claim, however, plaintiffs identify no contract with which Wilson interfered. A claim for interference with the right to make and enforce a contract must allege the actual loss of a contract interest. *See Morris*, 89 F.3d at 414-15 (citing *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262 (10th Cir.1989)). Because plaintiffs fail to make such a claim, summary judgment must be entered on plaintiffs' theory that defendant deprived them of their right to make, perform, modify and terminate a contract.

Alternatively, plaintiffs argue that freedom from racially discriminatory security practices is a benefit or privilege of a merchant's implied contractual offer to let them shop in its store. Plaintiffs cite no precedent for this theory and the cases have not recognized such grounds for recovery. Indeed, the United States District Court for the District of Delaware recently considered and rejected a similar argument. In *Lewis v. J.C. Penney*, 948 F.Supp. at 371-72, plaintiff sought to premise Section 1981 liability upon an implied contract between commercial establishments and the public, to the effect that those who enter store premises will be treated equally regardless of race. The court rejected this theory, reasoning that to allow plaintiff to proceed under such a theory "would come close to nullifying the contract requirement of section 1981 altogether, thereby transforming the statute into a general cause of action for race discrimination in all contexts." *Id.* This Court agrees. Congress did not intend such a result when it extended

Section 1981 to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *See* 42 U.S.C. § 1981(b) legislatively overruling *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-77, 109 S.Ct. 2363, 2372-73, 105 L.Ed.2d 132 (1989) (holding that Section 1981 does not extend to conduct after contract formation).[3] Accordingly, plaintiffs have failed to establish the third element of their prima facie case—that defendant infringed rights secured by Section 1981 when it interfered with the benefits and privileges of such a contract between Dillard's and its customers.

This holding does not fully resolve the matter, because in the *Pretrial Order* (Doc. # 105) entered November 17, 1997, plaintiffs advance the factual theory that Wilson interrupted them while they were redeeming their free cologne coupons, and that in doing so, he violated their rights to enjoy the benefits and privileges of their contract with Dillard's. Defendant does not deny that the samples were a benefit for purchases at Dillard's and admits that plaintiffs never redeemed the coupons. Defendant's motion for summary judgment does not discuss whether this interruption violated plaintiffs' right to enjoy this contractual benefit under Section 1981. This omission is understandable because under the *Scheduling Order* (Doc. # 18) entered July 9, 1997, defendant was required to file its motion for summary judgment before the pretrial order had been finalized. Indeed, defendant objected to those portions of the pretrial order which newly identified plaintiffs' inability to redeem the fragrance

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[3] To the extent plaintiffs seek relief for defendant's interference with their right to purchase personal property they could have sought relief under 42 U.S.C. § 1982, which provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

coupons as a basis for recovery. The Court allowed plaintiffs to proceed on their factual theory because it appeared to be clarification, however, and not a departure from previously pleaded grounds for relief. Nonetheless, summary judgment on this issue is inappropriate.[4]

B. False Imprisonment

Plaintiffs claim that when Wilson detained them for "no longer than" five minutes, he falsely imprisoned them in violation of Kansas law. To state such a claim "all that is necessary is that the individual be restrained of [her] liberty without any sufficient legal cause therefor, and by words or acts which the one being restrained fears to disregard." *Thompson v. General Fin. Co.*, 205 Kan. 76, 468 P.2d 269, 280 (1970). A person must be held against her will, however, because "if one agrees of one's own free choice to surrender freedom of motion, as by remaining in a room or accompanying another voluntarily, to clear oneself of suspicion or to accommodate the desires of the other, rather than yielding to the constraint of a threat, then there is no imprisonment." *See Wright v. Montgomery Ward & Co., Inc.*, 814 F.Supp. 986, 989 (D.Kan.1993) *aff'd* 25 F.3d 1059 (10th Cir.1994), citing W. Page Keeton, et al., Prosser & Keaton on the Law of Torts § 11, at 49 (5th ed.1984). Wilson's statement to Hampton—that she needed to calm down or he would call the Overland Park Police—does not constitute false imprisonment. No liability attaches for future threats, such as calling the authorities or having plaintiffs arrested. Such conduct amounts to moral pressure, but not unlawful restraint. *See id.*

Alternatively, even assuming that Wilson restrained plaintiffs' liberty under this standard, the Court finds

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[4] The Court notes that although the coupons were a benefit of purchase, Cooper did not make a purchase. Accordingly, the Court doubts whether she has an actionable claim under Section 1981.

that defendant is entitled to summary judgment under the statutory merchants' defense, K.S.A. § 21-3424, which provides as follows:

> Any merchant, or a merchant's agent or employee, who has probable cause to believe that a person has actual possession of and has wrongfully taken, or is about to wrongfully take merchandise from a mercantile establishment, may detain such person on the premises or in the immediate vicinity thereof, in a reasonable manner and for a reasonable period of time for the purpose of investigating the circumstances of such possession. Such reasonable detention shall not constitute an arrest nor criminal restraint.

K.S.A. § 21-3424(c). This provision extends to civil actions for false imprisonment. *Alvarado v. City of Dodge City*, 238 Kan. 48, 708 P.2d 174, 185 (1985); *Codner v. Toone*, 224 Kan. 531, 581 P.2d 387, 389 (1978).

Probable cause exists if the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution to believe that an offense has been or is being committed. *Alvarado*, 708 P.2d at 185. Plaintiffs argue that summary judgment on the merchants' defense statute is inappropriate because the existence of probable cause is a jury question. Plaintiffs are correct if the evidence, viewed in the light most favorable to plaintiffs, would permit the jury to reasonably find for plaintiffs on this issue. In this case, however, plaintiffs fail to identify material questions of fact which prevent summary judgment on the issue of probable cause.[5]

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[5] Indeed, plaintiffs admit that "the parties' evidence of what happened, the material facts, may not vary substantially . . . ." *See* plaintiffs' *Memorandum In Opposition To Defendant's Motion For Summary Judgment* (Doc. # 73) filed October 14, 1997, at p. 39.

While plaintiffs argue that a jury issue exists as to Wilson's credibility, they cite no evidence which seriously calls into question either Wilson's credibility or that of Fitzgerel—who independently observed Cooper in the fitting room. In the circumstances, plaintiffs' evidence, taken together, is insufficient to establish a reasonable inference that Wilson's testimony is unworthy of belief. *See Cone*, 14 F.3d at 530 (evidence insufficient to raise doubts about defendant's motivation). Cooper had reached the nexus where the store met the mall; Wilson had observed plaintiff carrying a dark cloth-like item in her hand and looking around "as if to see if someone was watching her;" and Fitzgerel observed Cooper pushing a rolled-up cloth item into her jacket while in the fitting room. Accordingly, the Court finds that no material questions of fact preclude the entry of summary judgment on the basis of the merchants' defense statute. Defendant's motion for summary judgment on plaintiffs' false imprisonment claim is sustained.

IT IS THEREFORE ORDERED that *Defendant's Motion For Summary Judgment* (Doc. # 67) filed September 24, 1997, should be and hereby is sustained. The motion does not address plaintiffs' claim that defendant interfered with their ability to redeem the perfume samples, however, and plaintiffs may proceed on their claim of race discrimination under 42 U.S.C. § 1981 in this limited regard.

IT IS HEREBY FURTHER ORDERED that Demetria Cooper on or before December 1, 1997, show cause in writing why her claims under 42 U.S.C. § 1981 should not be dismissed for legal insufficiency. On or before December 3, 1997, defendant shall file any response.

APPENDIX D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed Sep 4, 2001]

No. 98-3261
(D.C. No. 97-CV-2182-KHV)

PAULA DARLENE HAMPTON,
Plaintiff-Appellee,

DEMETRIA COOPER,
Plaintiff,

v.

DILLARD DEPARTMENT STORES, INC.,
Defendant-Appellant.

LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW,
Amicus Curiae.

ORDER

Before HENRY, ANDERSON, and LUCERO, Circuit Judges.

The appellant's petition for rehearing is denied by the panel that rendered the decision. Judge Anderson would grant panel rehearing.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. A poll was requested and a majority of the active judges voted to deny rehearing en banc. Chief Judge Tacha and Judges Kelly and Brorby would grant rehearing en banc.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ [Illegible]
Deputy Clerk

No. 01-842

IN THE

Supreme Court of the United States

DILLARD DEPARTMENT STORES, INC.,
Petitioner,

v.

PAULA DARLENE HAMPTON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court below correctly affirmed the jury's verdict that petitioner violated 42 U.S.C. § 1981, where the jury made express factual findings that petitioner—pursuant to a pervasive policy and practice of discrimination—subjected respondent to racial discrimination that interfered with and caused the loss of an actual contractual interest, where the court below applied well-settled legal standards to the facts as found by the jury, and where the court noted that its decision was aligned with those of all other circuits.

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IN THE

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No. 01-842

DILLARD DEPARTMENT STORES, INC.,
Petitioner,

v.

PAULA DARLENE HAMPTON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

INTRODUCTION

The jury in this case found that petitioner Dillard Department Stores, Inc. ("Dillard's") violated 42 U.S.C. § 1981 when it subjected respondent Paula Hampton to racial discrimination that interfered with and caused the loss of a contractual interest. The jury expressly found that Ms. Hampton was entitled to redeem a coupon for a fragrance sample as a benefit or privilege of a purchase she had made from Dillard's, and that Dillard's subjected her to intentional racial discrimination that interfered with her ability to enjoy that benefit or privilege. Pet. App. 2a. The jury's verdict, moreover, was based in part on overwhelming evidence that at this store Dillard's had a policy and practice of discriminating against African-American shoppers because of their race.

The court of appeals affirmed the jury's verdict, rejecting petitioner's arguments that the verdict was unsupported by the evidence. The court found (1) that "[t]he jury's credibility determinations and conclusion that the coupon conferred a right to a fragrance sample as a benefit of a contractual relationship are not against the weight of the evidence"; (2) that the jury reasonably determined that Dillard's "deliberately interfered with Ms. Hampton's redemption of the coupon and that she suffered an actual loss of a privilege of her contract because of this interruption"; and (3) that there was "ample" and "abundant" evidence from which "the jury reasonably inferred that Dillard's intentionally discriminated against [Ms. Hampton] on the basis of race." Pet. App. 13a-14a, 16a, 22a.

Nothing about this fact-intensive case warrants certiorari. Contrary to Dillard's arguments, there is no conflict among the circuits on the pertinent legal standards. Indeed, the Tenth Circuit expressly noted that "[w]e are aligned with all the courts that have addressed the issue" in ruling that a Section 1981 violation requires "interference with a contract beyond the mere expectation of being treated without discrimination while shopping." Pet. App. 38a. And again contrary to Dillard's arguments, the Tenth Circuit's application of well-settled law to the facts as found by the jury raises no extraordinary issue of national importance. At most, Dillard's complains of "erroneous factual findings or the misapplication of a properly stated rule of law"—neither of which are grounds for certiorari under this Court's rules. S. Ct. R. 10. The petition should therefore be denied.

COUNTERSTATEMENT

1. Factual Background. On April 5, 1996, Ms. Hampton, along with her niece Demetria Cooper, their children, and another child—all of whom are African-American—went shopping at a Dillard's department store in Overland Park, Kansas. Pet. App. 3a. As the evidence at trial would later reveal, this Dillard's store had a long-

standing policy and practice of targeting black and other racial minorities for security surveillance, stops, and searches. Almost immediately upon their entrance, Tom Wilson, a Dillard's security officer, began tracking the Hampton party through the store. *Id.* at 51a. Mr. Wilson claimed that his suspicions were aroused by the party's stroller, but he was later unable to recall whether the stroller even contained a child. Aplt's App. 1010, 1040-41.[1]

Ms. Hampton and Ms. Cooper eventually made their way to Dillard's children's department to find an Easter outfit for Ms. Cooper's infant son, at all times tracked by Mr. Wilson. Pet. App. 3a, 51a. After more than fifteen minutes of Mr. Wilson's "close" and "constant" surveillance, Aplt's App. 1043, he communicated his alleged suspicion to Pam Fitzgerel, a Dillard's buyer, and asked her to surveil the party. Ms. Fitzgerel later informed Mr. Wilson that she had seen a rolled-up article of clothing under Ms. Cooper's (not Ms. Hampton's) jacket, though she was not certain that the clothing was Dillard's merchandise. *Id.* at 1046-48, 1086.[2]

Ms. Hampton purchased an outfit for the child. In return, the salesperson gave her (as well as Ms. Cooper) coupons that could be redeemed at the fragrance counter for cologne samples. Pet. App. 4a. Ms. Hampton then proceeded to the fragrance counter to redeem her coupon. *Id.* She was in the process of doing so with the fragrance consultant, Betty Chouteau, when Mr. Wilson interrupted the transaction.

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[1] "Aplt's App." refers to the Appendix filed by Dillard's in the court below. "Supp. App." refers to the Supplemental Appendix filed by respondent in the court below.

[2] At trial, Ms. Fitzgerel testified that she had not seen Ms. Cooper take any Dillard's property, Aplt's App. 1090, remove any Dillard's items from the racks, *id.* at 1091, or put anything in her jacket, *id.* at 1090, and that her perception was tainted by the comments made to her by Mr. Wilson concerning his own purported suspicions, *id.* at 1088.

Mr. Wilson informed Ms. Hampton that "the . . . black female [referring to Ms. Cooper] had been observed placing something in her coat." Pet. App. 4a. Yet he never asked to see inside the coat. Aplt's App. 808, 831, 1022. Instead, as Ms. Chouteau testified, Mr. Wilson created "a rather embarrassing situation" by taking Ms. Hampton's bag, which had remained in her possession throughout, and dumping its contents on to the counter. Pet. App. 4a-5a.[3] Ms. Chouteau, in fact, was so embarrassed that she left that area of the counter during Mr. Wilson's search. *Id.* at 5a. Though Mr. Wilson's suspicions of shoplifting were assertedly based on Ms. Cooper's activities, this search and investigation involved only Ms. Hampton, of whom Mr. Wilson had admittedly developed no suspicion. Aplt's App. 1062. Mr. Wilson compared the contents of Ms. Hampton's bag against her receipt and found that they matched. Pet. App. 51a. Rather than apologizing, however, Mr. Wilson threatened to call the police and have Ms. Hampton removed from the store if she did not calm down. *Id.* at 5a, 51a-52a.

At that point, Ms. Hampton went to the customer service counter to lodge a complaint. Pet. App. 5a, 52a. However, "she was crying and so upset that she could not write out a customer comment card, and a Dillard's employee filled it out for her." *Id.* at 81a. Moreover, she was too distraught to drive and had to call her husband for a ride home. *Id.* Meanwhile, Mr. Wilson filled out a one and a half page incident report of his own in which he "reiterated the race of the shoppers a dozen times." *Id.* at 22a.[4]

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[3] According to Ms. Hampton's "eminently credible" testimony, Pet. App. 82a, Mr. Wilson "took [the] bag, dumped the contents out on the counter, and compared them to the receipt that was in the bag, and then he shoved everything back at [her]." *Id.* at 16a.

[4] In its petition, Dillard's selectively quotes from Ms. Hampton's deposition testimony, submitted with Dillard's summary judgment motion, in which Ms. Hampton noted that, immediately

2. District Court Proceedings. Ms. Hampton and Ms. Cooper sued Dillard's for violations of Section 1981 and for false imprisonment under Kansas law. The Section 1981 claim asserted, among other things, that Dillard's interfered with their redemption of the coupons because of their race, and that this interference "violated their right to enjoy all benefits, privileges, terms and conditions of their contractual relationship with Dillard's." Pet. App. 92a. Dillard's moved for summary judgment. The court granted summary judgment on the false imprisonment claims, finding that the evidence supported a probable cause defense to the state-law tort claim, but leaving to the jury to find whether the alleged probable cause was a pretext for racial discrimination in violation of Section 1981. The Court also granted summary judgment on Ms. Cooper's Section 1981 claim, on the ground that she had no contractual relationship with Dillard's because she did not actually purchase the clothing and had not intended to make any purchases. *Id.* at 96a. Thus, only Ms. Hampton's contract benefit claim was left for trial.

The court bifurcated the issues for trial. *Id.* at 64a. In the first phase, which included no evidence of Dillard's racial discrimination, the court instructed the jury that Ms. Hampton bore the burden of proving that she "was entitled to a free cologne sample as a benefit or privilege of her purchase," that Dillard's "intentionally interfered with [her] right to enjoy the benefits and privileges of that purchase," and that

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after and in light of the humiliation she had suffered as a result of the discrimination, asking for the samples "wasn't a concern for [her]." Supp. App. 104. That testimony, however, was never presented to the jury. The jury heard testimony that Ms. Chouteau had left the counter area as a result of the incident, that Ms. Hampton was in any event too upset, humiliated, and embarrassed by the incident to complete her shopping (indeed, too upset even to drive herself home), and that Ms. Hampton understood Mr. Wilson as conveying the message that she needed to leave the store and should be glad he was letting her go. Aplt's App. 624, 832, 833.

Dillard's "intentionally prevented [Ms. Hampton] from redeeming [the] coupon." Aplt's App. 141, 139 (Instr. 10, 12); *see* Pet. App. 2a, 17a. The jury, having had the opportunity to consider the credibility of the witnesses, and in light of all the evidence, found in Ms. Hampton's favor.

The jury's finding that Mr. Wilson intentionally interfered with and prevented the consummation of Ms. Hampton's ongoing transaction was both supported by the evidence and reinforced by Mr. Wilson's contradictory and implausible account of the incident. As to the consequences of Mr. Wilson's actions, "the jury concluded that, had there been no interference, Ms. Hampton would have received the service of [her] redemption of the coupon." Pet. App. 16a. And as to intent, the jury had ample reason to distrust Mr. Wilson's account. He testified at trial that he stopped Ms. Hampton and Ms. Cooper when they "were getting ready to exit the Dillard's store to go out into the mall." *Id.* at 14a. This testimony, however, was "directly contested" not only by the plaintiffs, but also by the fragrance consultant, Ms. Chouteau, who testified that Mr. Wilson stopped Ms. Hampton at the fragrance counter while she was attempting to redeem her coupon. *Id.* at 15a.

In phase two, the court instructed the same all-white jury that Ms. Hampton bore the burden of proving by a preponderance of the evidence that her "race was a motivating factor in [defendant's] conduct." Pet. App. 3a. The jury again found that Ms. Hampton had met her burden, and the jury's findings were again supported by overwhelming evidence—this time of Dillard's policy and practice at this store of discriminating against African-Americans. As the district court noted, this evidence contained testimony, including from former Dillard's employees, that Dillard's "routinely targeted and investigated African-Americans as shoplifting suspects"; that "through race codes, Dillard's targeted black customers (but not white customers) when

they entered the store";[5] that two former security officers resigned from Dillard's "in part, because of its discriminatory practices" and Dillard's refusal to end them;[6] that the local police department was concerned about Dillard's "bad arrests"; that the store " 'preyed on' and targeted African-American shoppers"; "that store incident reports identified shoppers by race and by no other characteristics"; and that "African-American shoppers were written up for 'suspicious' activity such as returning merchandise without a receipt." *Id.* at 62a-63a.[7] And, as the district court observed, "there was ample evidence that the act of selectively targeting African-Americans was authorized by [the] managerial agents for Dillard's." Pet. App. 80a.

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[5] Dillard's security guards used radio codes to refer to African-Americans (females were code 3s and males were code 4s), such that if two African-American females entered the store, a guard might advise another via radio that "we have a couple of code 3s coming in the south door." Aplt's App. 717. White customers, by contrast, were not racially identified as they came into the store. *Id.* at 766. African-American customers were placed under surveillance by Dillard's employees upon entering the store for no reason other than their race. *Id.* at 471, 745, 750, 765, 768, 973.

[6] One African-American former guard "testified that in mid-to-late 1997, he was working plain clothes security and received a call reporting that a black man was walking around the store. It soon dawned on him that he was the subject of the report, even though he had done nothing suspicious." Pet. App. 71a.

[7] As the district court noted, "the jury learned the astoundingly innocuous nature of conduct which Dillard's viewed as 'suspicious' when committed by minority shoppers—whether black, Hispanic, or otherwise," from security log entries such as " 'two black females in dresses [department],' 'four black males and one black female made purchase and left without incident,' 'two groups of black females in better dresses [department],' and 'two black females walking around with a list of some kind.' " Pet. App. 75a n.12 (citations omitted).

Dillard's pattern and practice of discrimination, combined with Mr. Wilson's lack of credibility, fully supported the jury's finding that his proffered justifications for violating Ms. Hampton's rights were pretextual. In the district court, Dillard's argued that Mr. Wilson could not have acted with discriminatory intent because the district court had granted summary judgment on the state-law false imprisonment claim, finding sufficient evidence of probable cause under the applicable state law. *Id.* at 55a-63a. As the district court made clear, however, "the Court's probable cause finding at summary judgment was not determinative of the § 1981 claim," in part because "probable cause may clearly be a pretext for discrimination when security officers detain only *minority* shoplifting suspects." *Id.* at 60a (emphasis in original).[8]

Thus, regardless of whether Mr. Wilson's testimony regarding his alleged probable cause was sufficient for purposes of summary judgment on the state law claim, the jury was entitled to find that his testimony was a pretext for discrimination. The evidence of such pretext included not only Mr. Wilson's lack of credibility but also his own testimony that he had placed Ms. Hampton and Ms. Cooper under "close" and "constant" surveillance fifteen minutes *before* he even noticed the conduct of Ms. Cooper that allegedly constituted the probable cause. Aplt's App. 1043. As the district court put it, at trial "[t]he Court * * * observed that Wilson was not a credible witness, and the jury obviously agreed." *Id.* at 79a.

Given this lack of credibility and the overwhelming evidence of Dillard's pervasive and persistent discriminatory

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[8] Moreover, as the district court noted, the fact that summary judgment was granted on the state-law claim based on the summary judgment record did not preclude the jury from discounting the evidence of probable cause based on the fuller trial record, where Mr. Wilson's credibility was a major issue. *Id.* at 59a-60a.

practices, the district court noted that there was ample basis for the jury's finding that "Wilson targeted [Ms. Hampton] and her niece at least in part because of this discriminatory practice, and that in so doing Wilson interfered with [Ms. Hampton's] enjoyment of a benefit of her contractual relationship with Dillard's in violation of § 1981." *Id.* at 63a.

The jury, no doubt persuaded by Ms. Hampton's "eloquent and emotionally moving testimony that Wilson disgraced and humiliated her, in front of her children," that "she is now unable to shop with her children for fear of future ridicule and humiliation [and that] her daughter had repeated nightmares regarding the incident," Pet. App. 32a, 81a, awarded Ms. Hampton compensatory damages for her personal injury, as well as punitive damages reflecting the reprehensibility of Dillard's policy of intentional racial discrimination.

3. Court of Appeals Proceedings. The court of appeals affirmed the district court's rulings upholding the jury's verdict. After stating that a Section 1981 claim "must involve the actual loss of a contract interest, not merely the possible loss of future contract opportunities," Pet. App. 12a, the court held that the evidence overwhelmingly supported the jury's verdict on this point, as well as all the other issues raised by Dillard's.

On the first issue raised by Dillard's, as to whether the requisite contractual relationship existed, the court held that "[t]he jury's credibility determinations and conclusion that the coupon conferred a right to a fragrance sample as a benefit of contractual relationship are not against the weight of the evidence as a matter of law." Pet. App. 13a-14a; *see also id.* at 14a ("[W]e cannot say that the jury's conclusion that the coupon was a benefit of Ms. Hampton's contract with Dillard's was unreasonable.").

On the next issue, as to whether Dillard's interfered with that contractual benefit, the court noted that "[t]he jury concluded that, had there been no interference, Ms. Hampton

would have received the service of [her] redemption of the coupon." Pet App. 16a; *see also id.* at 17a (noting that the jury was instructed that it must find that Dillard's "intentionally prevented [Ms. Hampton] from redeeming [the] coupon") (citation omitted). After reviewing the evidence supporting that finding, the court held that "[w]e do not question the jury's credibility determinations, and we cannot say that as a matter of law the jury's conclusion is incorrect." *Id.* at 16a.

The court dismissed Dillard's argument that Mr. Wilson's race-motivated interference should be immunized from review under Section 1981 because its timing was "fortuitous," holding that "Mr. Wilson's inopportune timing neither alters the resulting interruption of an ongoing transaction nor defeats this § 1981 action." *Id.* at 16a n.3. The court likewise rejected Dillard's argument that it was immunized from liability because Mr. Wilson, even if he had discriminated against Ms. Hampton on the basis of her race, allegedly had no subjective intent to interfere with her contract. The court noted that Section 1981 "protects enjoyment of the benefits of a contract from *any* impairment, so long as the impairment arises from intentional discrimination." *Id.* at 16a-17a (emphasis in original). But the court also held, in the alternative, that even if subjective intent to interfere with a contract were required, "a reasonable juror could find a legally sufficient evidentiary basis to support such a finding, if [the juror] disbelieved Mr. Wilson's testimony." *Id.*

On the next issue, as to whether Dillard's interference was motivated at least in part by race, the Court recounted the "abundant evidence" of racial discrimination, Pet. App. 22a, and concluded that "there was ample evidence (most tellingly Mr. Wilson's security report, which reiterated the race of the shoppers a dozen times, and testimony presented to the jury regarding the store's discriminatory coding practices) for the jury to determine that 'race was a motivating factor' in Mr.

Wilson's interaction with Ms. Hampton," and that "the reasons given by Mr. Wilson * * * were pretextual." *Id.*

Ruling on Ms. Cooper's cross-appeal (which is not before this Court), the court of appeals affirmed the trial court's holding that Ms. Cooper could not sustain a Section 1981 action because she—unlike Ms. Hampton—had never made or intended to make a purchase and therefore lacked the requisite contractual relationship with Dillard's. Pet. App. 38a-40a. In that regard, the court held that it "cannot extend § 1981 beyond the contours of a contract," and made clear that it was "aligned with all the courts that have addressed the issue that there must have been interference with a contract beyond the mere expectation of being treated without discrimination in shopping." *Id.* at 38a.

Judge Anderson dissented, but his dissent was primarily directed at what he perceived as insufficient evidence rather than a disagreement with the legal standards employed by the majority. *See id.* at 47a ("I would find that there is no legally sufficient evidence supporting the jury's verdict in favor of Ms. Hampton."). In his view, the evidence did not show that Mr. Wilson had the subjective intent to disrupt Ms. Hampton's coupon redemption. *Id.* at 45a. Additionally, the dissent contended, "[e]ven if the original surveillance of plaintiffs was race-based," there was no direct evidence of discrimination—such as "racially derogatory remarks"—demonstrating that Mr. Wilson's decision to stop Ms. Hampton was likewise motivated by race. *Id.* at 46a-47a.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT

This case does not implicate any conflict among the courts of appeals. To the contrary, the decision below involved a straightforward application of settled legal principles to the facts properly found by a jury, and the court itself noted that its position was "aligned with all the courts that have ad-

dressed the issue." Pet. App. 38a. Notwithstanding Dillard's attempt to manufacture a conflict, the circuits have applied the same legal standard under Section 1981, and no circuit has ever suggested otherwise. Unable to take issue with the legal standard applied by the Tenth Circuit, Dillard's is reduced to arguing that the evidence—which it only selectively presents—did not warrant liability under that standard. But a reweighing of the evidence that was presented to the jury and reviewed by both courts below is not an appropriate role for this Court. *See* Sup. Ct. R. 10.

1. The cases cited by Dillard's, far from exemplifying a "profound conflict among the circuits," Pet. 11, are entirely consistent with each other. According to Dillard's, the Tenth Circuit departed from the standard of other circuits requiring a Section 1981 plaintiff to show that "the conduct about which she complained resulted in the 'actual loss of a contract interest.' " *Id.* at 13 (citation omitted). But the Tenth Circuit did not depart from the "actual loss of a contract interest" standard. Quite to the contrary, on no fewer than three occasions the court expressly identified that precise standard as the one governing its analysis. As the court held, " 'a § 1981 claim for interference with the right to make and enforce a contract must involve the actual loss of a contract interest.' " Pet. App. 12a (citation omitted); *see also id.* at 6a (citing Tenth Circuit precedent as "requiring actual loss of contract interest for a § 1981 claim for interference with the right to make and enforce a contract"); *id.* at 6a n.1 (noting that the 1991 amendments to Section 1981 "do not alter the requirement of an actual loss of a contract interest"). Examining the evidence, the court rejected Dillard's argument that Ms. Hampton had failed to satisfy that standard, noting the jury's conclusion that "had there been no interference, Ms. Hampton would have received the service of [her] redemption of the coupon," and holding that "we cannot say that as a matter of law the jury's conclusion is incorrect." *Id.* at 16a.

Dillard's says that the Tenth Circuit applied a different standard from that applied by the Seventh Circuit in *Morris* v. *Office Max, Inc.*, 89 F.3d 411 (7th Cir. 1996). But far from establishing such a conflict, the Tenth Circuit expressly relied on *Morris* in reaching its own holding. *See* Pet. App. 14a, 16a n.3. And the Seventh Circuit, for its part, expressly relied in *Morris* on the Tenth Circuit's earlier decision in *Phelps* v. *Wichita Eagle-Beacon*, 886 F.2d 1262 (10th Cir. 1989), which the Tenth Circuit identified as supplying the appropriate standard in this case. *See Morris*, 89 F.3d at 414-415; Pet. App. 6a, 12a, 14a. Thus, rather than warring with each other on the proper interpretation of Section 1981, these two circuits have fully embraced each other's analytical approaches.

As the Tenth Circuit held, the evidence in this case (unlike the evidence in *Morris*) was clearly sufficient for the jury to have found a Section 1981 violation under the *Morris* standard. In *Morris*, two African-American men had been shopping at the defendant's store when they were confronted by police officers summoned by store personnel. The men left the store after the incident and later sued under Section 1981, alleging that their encounter with the police "discouraged and dissuaded" them from purchasing time stamps they had discussed a few days earlier. 89 F.3d at 414. Noting the lack of any evidence that the plaintiffs ever intended to make a purchase, the court held that the allegation of interference with " 'prospective contractual relations' " was "speculative and insufficient to state a claim under § 1981." *Id.* This case is entirely consistent with *Morris*. The Tenth Circuit faithfully applied the *Morris* standard, and upheld the jury's verdict because the evidence in this case, unlike that in *Morris*, was sufficient for the jury

to conclude that "Wilson interrupted an *ongoing transaction*." Pet. App. 17a-18a. (emphasis added).[9]

Dillard's also asserts that the Tenth Circuit applied a different standard than the Seventh Circuit applied in *Bagley* v. *Ameritech Corp.*, 220 F.3d 518 (7th Cir. 2000). *Bagley*, however, is simply another case that was dismissed because the plaintiff, proceeding on what the court described as a "prospective contract theory," could not establish that he had or would have entered into any contract. *Id.* at 520-522. In *Bagley*, a sales clerk allegedly did not serve an African-American shopper who had earlier "earned his enmity." *Id.* at 519. Another clerk, however, did offer to serve the plaintiff, but the plaintiff "promptly left the store." *Id.* at 519-520. When he returned later that day, the other clerk renewed his offer of assistance, but the plaintiff declined the offer. *Id.* at 520. In the absence of evidence that the store deprived the plaintiff of any contract interest, the court held that he could not make out a claim under Section 1981. This result is entirely consistent with the Seventh Circuit's earlier analysis in *Morris*, and with the analysis employed by both lower courts in this case, which held that the evidence supported the jury's finding that Ms. Hampton was deprived of a contractual benefit as a result of Dillard's discrimination.

Dillard's next claims that *Bellows* v. *Amoco Oil Co.*, 118 F.3d 268 (5th Cir. 1997), *cert. denied*, 522 U.S. 1068 (1998), conflicts with the Tenth Circuit's decision in this case. There is no such conflict. In that case, the majority owner of a company that did business with Amoco alleged that Amoco

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[9] Indeed, the Tenth Circuit relied on this factual distinction in affirming the dismissal of Ms. Cooper's Section 1981 claim because she—like the plaintiffs in *Morris*, but unlike Ms. Hampton—did not "make or attempt to make a purchase" at Dillard's. Pet. App. 39a. Although appellees had urged that Ms. Cooper did in fact possess the requisite contractual interest, the court did not accept that argument.

had discriminated against him and his company on the basis of his race. The jury, however, found that Amoco did not interfere with the contract rights of the plaintiff's company, and it was undisputed that the plaintiff himself did not do business with Amoco individually. *Id.* at 273, 275 n.23. Under these circumstances, the Fifth Circuit found that the evidence did not support the plaintiff's Section 1981 claim, because the plaintiff never had a contractual relationship with Amoco. As the Tenth Circuit found, the facts of this case warrant a different result under the same standard. For here, unlike in *Bellows*, there was substantial evidence sufficient for the jury to find both the existence of a contract benefit and Dillard's interference with that benefit.[10]

The final appellate decision cited by Dillard's as support for the purported conflict is *Youngblood* v. *Hy-Vee Food Stores, Inc.*, 266 F.3d 851 (8th Cir. 2001). In that case, the plaintiff had already made his purchase from the defendant's store and was headed toward the exit when he was detained and held on suspicion of shoplifting. *Id.* at 853-854. As with the cases discussed above, the outcome in *Youngblood* turned on facts not present here. Indeed, the Eighth Circuit emphasized that its holding was entirely consistent with the Tenth Circuit's decision in this case, which the Eighth Circuit distinguished on *factual* grounds. *Id.* at 854. The Eighth Circuit observed that the contractual relationship between

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[10] The Fifth Circuit applied the same "actual loss of a contractual interest" standard in its recent decision in *Morris* v. *Dillard Department Stores, Inc.*, No. 00-30710, __ F.3d __, 2001 WL 1650937 (5th Cir. Dec. 26, 2001), which involved another Section 1981 claim against Dillard's. After reviewing its own precedent in *Bellows* and case law from other circuits, the Fifth Circuit affirmed the district court's decision granting summary judgment to the defendant because the plaintiff failed to offer any evidence "of some tangible attempt to contract with" Dillard's that "could give rise to a contractual duty between her and the merchant, and which was in some way thwarted." *Id.* at *5.

Ms. Hampton and Dillard's involved continuing duties on the part of the store, whereas the actions of which Mr. Youngblood complained did not occur until after he had already completed his purchase, at which point "neither party owed the other any duty under the retail-sale contract." *Id.*

Thus, *Morris*, *Bagley*, *Bellows* and *Youngblood* do not apply a stricter standard for liability under Section 1981 than the Tenth Circuit applied in this case. They simply apply the same standard to different sets of facts.[11]

2. The cases cited by Dillard's as evidence that other courts of appeals have established "a sweeping standard for

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[11] The district court opinions cited by Dillard's, *see* Pet. 15-16 & nn.2-4, similarly fail to establish that the lower courts have applied different standards for assessing liability under Section 1981. Indeed, in one of those cases, *Garrett* v. *Tandy Corp.*, 142 F. Supp. 2d 117, 119 n.3 (D. Me. 2001), the court relied on the Tenth Circuit's decision in this very case to support its own holding. *See also Lewis* v. *J.C. Penney Co.*, 948 F. Supp. 367, 372 (D. Del. 1996) (interference occurred after plaintiff "had done her shopping and was leaving the store; no contractual relationship remained"); *Rogers* v. *Elliott*, 135 F. Supp. 2d 1312, 1315 (N.D. Ga. 2001) (interference occurred after plaintiffs "had completed their purchase and finished shopping at Wal-Mart") (quotation omitted); *Jackson* v. *Tyler's Dad's Place, Inc.*, 850 F. Supp. 53 (D.D.C. 1994) (no allegations to support claim of racial discrimination), *aff'd*, 107 F.3d 923 (D.C. Cir. 1996); *Jeffery* v. *Home Depot U.S.A., Inc.*, 90 F. Supp. 2d 1066, 1069 (S.D. Cal. 2000) (finding no liability because "no search ever took place" and plaintiff "was not denied service or detained"); *Robertson* v. *Burger King, Inc.*, 848 F. Supp. 78, 81 (E.D. La. 1994) (finding that "plaintiff was not denied admittance or service" and holding that "the mere fact of slow service in a fast-food restaurant does not . . . rise to the level of violating one's civil rights"); *Bobbitt* v. *Rage Inc.*, 19 F. Supp. 2d 512, 518 (W.D.N.C. 1998) (same); *compare* Pet. App. 16a-17a n.3 (citing with approval cases holding that mere delay is not actionable under Section 1981 absent the denial of admittance or service).

Section 1981 claims," Pet. 17, similarly fail to support that claim. Dillard's mischaracterizes the import of the Sixth Circuit's decision in *Christian* v. *Wal-Mart Stores, Inc.*, 252 F.3d 862 (6th Cir.), *supplemented*, 266 F.3d 407 (6th Cir. 2001). In that case, an African-American woman was accused of shoplifting, the police were summoned, and she and a companion were escorted from the store and were not allowed to complete their purchases. 252 F.3d at 864. The Sixth Circuit did not, as Dillard's asserts, establish a blanket rule allowing Section 1981 plaintiffs to prevail merely by showing that they received services in a "markedly hostile" manner. Pet. 17 (quoting *Christian*, 252 F.3d at 872). Rather, in the aspect of its decision cited by Dillard's the court was articulating the requirements for a *prima facie* case of discrimination. Recognizing that direct evidence of discriminatory intent is seldom available, the court held that this factor can be shown either "by demonstrating discriminatory treatment with respect to similarly situated persons," or, when such a comparison cannot be made, by showing that the defendant rendered service to the plaintiff "in a markedly hostile manner and in a manner which a reasonable person would find objectively discriminatory." *Christian*, 252 F.3d at 872-873.

This part of the *Christian* decision, then, does not concern whether the plaintiff suffered the "loss of an actual contract interest"—the question that Dillard's claims has divided the courts of appeals. Rather, this language addresses whether the defendant acted with discriminatory intent—a finding of the jury that Dillard's does not challenge in its petition to this Court. Indeed, the *Christian* court noted that the record reflected that the plaintiff "would, in fact, have completed her purchase had she not been asked to leave the store" and therefore that the case did not present any issue as to whether there was a valid contract interest at stake. *Id.* at 874.

Dillard's similarly misconstrues the Third Circuit's holding in *Hall* v. *Pennsylvania State Police*, 570 F.2d 86 (3d Cir.

1978). That case involved allegations that a bank, in cooperation with the police, had photographed its African-American customers but not its white customers. The court's statement that Section 1981 "obligates commercial enterprises to extend the same treatment to contractual customers 'as is enjoyed by white citizens,' " *Hall*, 570 F.2d at 92, is hardly controversial and in no way conflicts with the "actual loss of a contract interest" standard applied by the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits. Indeed, as one court has noted, both *Hall* and the district court's decision in this case are entirely consistent because "[i]n both *Hall* and *Hampton* * * * the defendants were offering the African-American plaintiffs different and less favorable contractual terms than they offered white consumers." *Brown* v. *Phillip Morris, Inc.*, No. 98-5518, 1999 WL 783712, at *8 (E.D. Pa. Sept. 22, 1999), *aff'd*, 250 F.3d 789 (3d Cir. 2001).[12]

Thus, the petition does not implicate any conflict among the courts of appeals concerning the proper legal standard to be applied in cases brought pursuant to the "make and enforce" provision of Section 1981. That some plaintiffs have prevailed under this provision and others have not results from different factual circumstances, not different legal standards. Dillard's quarrel in this case is therefore not with the legal standard applied by the Tenth Circuit, but rather with the jury's verdict that the evidence satisfied that standard. Both the Tenth Circuit and the district court properly found that the evidence overwhelmingly did so, and that conclusion implicates no extraordinary issues warranting

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[12] Although the *Hall* court was imprecise in describing the nature of the contract interest at issue in that case, that is not surprising given that *Hall* was decided long before this Court's decision in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), and the subsequent Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, placed renewed emphasis on that factor.

this Court's further review.[13] *See Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (stating that this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error"); *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975) (discussing "heavy burden under the 'two-court rule' " when challenging factual findings concurred in by both lower courts); *see also Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000) (deferential standard governing review of jury verdicts requires courts to "review the record as a whole," and "disregard all evidence favorable to the moving party that the jury is not required to believe").

II. THIS CASE INVOLVES NO RECURRING ISSUE OF NATIONAL IMPORTANCE

Faced with no actual conflict in the lower courts regarding the proper legal standards, Dillard's—without disputing the overwhelming evidence that it engaged in racial discrimination—stresses several other factual aspects of this case that it apparently contends justify reversal. Dillard's then argues that this Court's review is required so that retail stores will have a clear understanding that Section 1981 does not prohibit racial discrimination in such circumstances. Far from showing that its petition involves unsettled legal issues of national importance, Dillard's emphasis on the factual minutiae of this case demonstrates the opposite.

Throughout its petition, Dillard's highlights the "negligible value," Pet. 8, 10, 19, of the contract interest at issue, the "fortuitous timing," *id.* at 3, 9, 10, 20, 22, of Mr. Wilson's "brief investigative stop," *id.* at 3, 4, 7, 12, 18, 19, 20, 21,

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[13] Even the dissent did not argue that the majority had applied an incorrect standard or one rejected by other courts. Indeed, the dissent cited no case from any other circuit, and instead took issue with the sufficiency of the evidence supporting the jury's verdict. *See* Pet. App. 47a.

and the asserted absence of any specific intent on his part to interfere with Ms. Hampton's contract rights, *id.* at 9, 10, 20. But none of this alters the central facts—found by a jury, amply supported by the evidence, and uncontested here by Dillard's—that Ms. Hampton was entitled to redeem a coupon for a fragrance sample as a benefit or privilege of a purchase she had made from Dillard's, and that Dillard's subjected her to intentional racial discrimination that interfered with her ability to enjoy that benefit or privilege.

No court has ever adopted Dillard's apparent position—that a store can discriminate against customers on the basis of race provided the discrimination interferes with transactions of only "nominal" or "negligible" value, the timing of the discrimination is "fortuitous," or the person engaging in the intentional discrimination did not have the subjective intent to interfere with the transaction. These inconsequential factual distinctions hardly implicate any "important and recurring issue of federal law," as Dillard's contends. Pet. 22. As shown above, the legal standards governing this case are well established. Far from bringing certainty to the law, adopting Dillard's fact-specific distinctions would unsettle the clear legal standards applied by the lower courts, and replace them with a host of factual distinctions that have no relevance to the goals or purposes of Section 1981.

Section 1981 protects the right to be free from discrimination in the making and enforcement of contracts. Contrary to Dillard's suggestion, Pet. 10, this right is not tied to the economic value of the contract at issue. *See Runyon* v. *McCrary*, 427 U.S. 160, 172, 182 (1976) (noting that the damages suffered by the plaintiffs from a "classic violation of § 1981," whether "characterized as involving 'injured feelings and humiliation' * * * or the vindication of constitutional rights," "was to their persons, not to their realty or personalty") (citations omitted). Contractual transactions often involve items of small value, but the jury here properly found that racial discrimination interfering with such trans-

actions is just as actionable as discrimination interfering with transactions of larger value. It is therefore immaterial that Dillard's discriminatory actions interfered with Ms. Hampton's redemption of a fragrance coupon rather than with the purchase of her grand-nephew's Easter outfit, because both were benefits of her transaction, as the jury found.

Similarly, Dillard's repeatedly attempts to characterize its discrimination as innocuous because its timing was "fortuitous" and because it was part of an investigatory stop allegedly supported by "probable cause." Neither of these elements negates the discriminatory nature of Mr. Wilson's actions. And neither is legally relevant to this case. Mr. Wilson could have interfered with Ms. Hampton's transaction at the checkout counter instead of the fragrance counter; this timing, too, would have been fortuitous. But in either case, it would not alter the jury's determination—unchallenged here by Dillard's—that Mr. Wilson's actions were racially motivated and interfered with an ongoing contractual relationship. This jury determination also renders irrelevant the assertion that Mr. Wilson acted on "probable cause." As the Tenth Circuit noted, "there was sufficient evidence presented for the jury to infer [Dillard's] reasons were pretextual." Pet. App. 19a (citation omitted); *id.* at 19a n.4.[14]

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[14] Relying on testimony by Mr. Wilson that was later contradicted at trial, the district court found that probable cause existed within the meaning of the Kansas merchants' defense statute, Kan. Stat. Ann. § 21-3424, justifying dismissal of the plaintiffs' false imprisonment claims. Pet. App. 95a-96a. As both lower courts recognized, this state-law determination at the summary judgment stage was not determinative of the Section 1981 claim. *Id.* at 19a n.4, 28a, 56a. Thus, contrary to Dillard's' claims, the inapplicability of a defense to a state-law tort for false imprisonment to a federal anti-discrimination statute does not "implicate[ ] important questions regarding the division of authority between Federal and State government." Pet. 24.

Finally, Dillard's suggests that its interference with Ms. Hampton's contract rights is not actionable because "Wilson's testimony does not suggest he had the subjective intent to prevent the redemption of the coupon." Pet. 20. According to this novel theory of Section 1981 liability, it is not enough that a defendant acted with discriminatory intent and that his actions interfered with the making or enforcement of a contract; the defendant must also have the subjective intent to interfere with the transaction. This interpretation of Section 1981—far from implicating a circuit conflict on an important issue of law—is not supported by the statutory language or any decisional precedent. As the Tenth Circuit correctly held, intentional racial discrimination that interferes with the making or enforcement of contracts is actionable under Section 1981 regardless of whether the defendant subjectively intended to interfere with the contractual interest. Pet. App. 17a. In any event, this case does not even present that issue, as the Tenth Circuit held in the alternative that Dillard's could not escape liability even under this heightened standard given the evidence in the case. *See id.* ("Even under the dissent's suggestion that subjective intent to interfere with a contract is required, a reasonable juror could find a legally sufficient evidentiary basis to support such a finding, if [the juror] disbelieved Mr. Wilson's testimony.").

There is therefore no need for this Court to review this case in order for retail establishments to "enforce consistent policies" and avoid a "patchwork of procedures and protocols." Pet. 23-24. Based on the clear law applied uniformly throughout the Nation, Dillard's should have long ago adopted uniform policies preventing, at a minimum, intentional racial discrimination that interferes with "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(a), (b). The evidence in this case showed that Dillard's lacked such policies at its Overland Park store and yet Dillard's now

argues that it needs guidance from this Court that would, for instance, authorize its stores to engage in intentional racial discrimination against customers that interferes with purchases of "nominal value," that involves "fortuitous" timing, or that is not undertaken for the subjective purpose of interfering with contractual rights. No such guidance is needed. Dillard's should instead take its guidance from the statute itself, from the uniform legal standard applied by the lower courts, and from the jury's verdict based on the evidence in this case.

The petition asks this Court to review the factual determinations made by a jury and upheld by the lower courts under legal standards upon which the courts of appeals are in agreement. There is no cause for the Court to engage in this intensely factual inquiry, which presents no unsettled issue of federal law.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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No. 01-842

IN THE

Supreme Court of the United States

DILLARD DEPARTMENT STORES, INC.,
Petitioner,

v.

PAULA DARLENE HAMPTON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF CERTIORARI

In Dillard's petition for certiorari, we explained (Pet. 13-22) that the decision below implicates a well-developed conflict among the courts of appeals as to the proper legal standards that govern whether conduct violates the "make and enforce contracts" provision of 42 U.S.C. § 1981. Further, because this conflict concerns the uniform interpretation of the Nation's civil rights laws—a recurring issue of unquestioned importance—Dillard's submitted that this case warranted further review by this Court. Pet. 23-24.

Respondent's Brief in Opposition ("Opp.") makes three arguments to avoid these conclusions. First, Hampton tries to divert attention from the relevant legal issues by peppering her brief with arguments regarding the jury's purported finding of a "pervasive policy and practice of discrimination" that have no bearing on the resolution of the legal issue presented by the holding below. Opp. i, 2-4 & nn.3-4. Second, Hampton erroneously asserts that review should be denied because all of the courts of appeals are "'aligned,'" *id.* at 11, and that the decision below merely "embrace[s]" this settled body of law. *Id.* at 13. Finally, Hampton argues that this case involves no recurring issue of national importance. *Id.* at 19. What these arguments cannot undermine is the core fact that, if Hampton's claim had been brought in the Fifth, Seventh or Eighth Circuits, it would have been dismissed. It is that fact that warrants this Court's attention.

1. Contrary to the thrust of respondent's opposition (and her rewrite of Dillard's question presented), Dillard's does not seek review of the trial rulings that formed the basis of its request below for a new trial on the issue whether Officer Wilson's *subjective* decision to conduct a brief investigative stop was motivated by Hampton's race or was part of a

"pervasive policy and practice of discrimination." Opp. i.[1] Instead, Dillard's seeks review of whether the court below adopted an appropriate legal standard for determining whether the conduct about which Hampton complained violated her right to "make and enforce contracts," 42 U.S.C. § 1981(a), and justified the heart-stopping $1.15 million compensatory and punitive award, see Pet. i.

As to that question, Hampton purports not to quarrel with the numerous courts that have determined that Section 1981 does not extend to "the mere expectation of being treated without discrimination in shopping." Opp. 11 (internal quotation marks omitted). Indeed, Hampton acknowledges that the district court bifurcated the trial so that the issue of whether Dillard's violated Hampton's right to "make and enforce" her contract would be resolved without reference to any testimony regarding "racial discrimination." *Id.* at 5. Nevertheless, Hampton now seeks to make this case solely about race by arguing that certiorari should be denied on the contract interference issues because there was "overwhelming evidence that [Dillard's] engaged in racial discrimination." *Id.* at 19.[2] That argument, however, merely underscores the error committed by the court of appeals in conflating the issue of contract interference with the issue of race discrimination.

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[1] For example, in its motion for a new trial, Dillard's explained that "'the bulk of the evidence produced by plaintiff at trial was unrelated to Officer Wilson, plaintiff, or the time period when the alleged intentional discrimination took place.'" Pet. App. 66a. Although Dillard's disagrees with the lower courts' resolution of these issues, it has never contended that these fact-intensive questions warrant exercise of this Court's discretionary review.

[2] Thus, Hampton contends that (a) an "all-white jury" concluded that "'race was a motivating factor'" in the "'conduct'" of Wilson, Opp. at 6, (b) there was "overwhelming evidence that at this store Dillard's had a policy and practice of discriminating against African-American shoppers," *id.* at 1, and (c) "this Dillard's store had a long-standing policy and practice of targeting black and other racial minorities for security surveillance, stops, and searches," *id.* at 2-3.

In doing so, the holding below conflicts with other courts of appeals by predicating liability under Section 1981 not upon proof of the loss of an actual contract right, but upon evidence that respondent was subjected to conduct (surveillance, an investigative stop and an accusation of shoplifting), Pet. App. 32a, 33a-34a, that did not deprive her of any right to the "'free cologne sample'" at issue, *id.* at 2a.

The absence of any loss of contractual right from this conduct follows directly from the district court's determination that Hampton "did not attempt to redeem the fragrance coupons after the encounter because ... 'it wasn't a concern to her.'" Pet. App. 89a-90a. Hampton seeks to avoid this fact by accusing Dillard's of "selectively quot[ing] from Ms. Hampton's deposition testimony." Opp. 4 n.4. But this uncontraverted finding comes directly from the district court's own assessment of the record in its summary judgment order, Pet. App. 89a-90a, and was accurately quoted by Dillard's, *e.g.*, Pet. 3. In ruling against Dillard's, the court of appeals plainly relied upon *both* the "trial transcript" *and* "the district court's orders" to compile its statement of "material facts." Pet. App. 3a. But even without this admission, the holdings below required *no* evidence that Hampton suffered an actual loss of a contractual right, because her right "to a free cologne sample" both before and after the investigative stop was precisely the same.

Recognizing that fact, Hampton argues that she never sought to obtain her fragrance coupon after the investigative stop because, "as a result of the discrimination," she was "too upset, humiliated, and embarrassed by the incident to complete her shopping." Opp. 5 n.4. The court of appeals employed a similar legal analysis, relying upon testimony that Hampton had been accused of shoplifting to support the jury's compensatory award, Pet. App. 32a, and testimony regarding "the coding and close surveillance of African-American shoppers" to support the punitive award, *id.* at 35a. But, as dissenting Judge Anderson explained:

> all of the evidence indicates that it was the wrongful accusation of shoplifting . . . which caused Ms. Hampton's alleged injuries. But § 1981 does not provide a remedy for the wrongful accusation of shoplifting, absent some interference with a contract benefit.

Id. at 46a. Simply put, the court of appeals justified the jury's substantial compensatory and punitive awards based upon conduct (*i.e.*, surveillance, a brief investigative stop, and an accusation of shoplifting) which, although unpleasant for respondent, did not result in the loss of a contractual right to a "free cologne sample," and therefore could not have violated Section 1981 as interpreted by a majority of the courts of appeals that have addressed the question. See Pet. 13-16.

2. Nevertheless, respondent argues that the court of appeals stated that its decision was "'aligned with all the courts that have addressed the issue,'" Opp. at 11-12 (quoting Pet. App. 38a), and thus insists that "the decision below does not conflict with the decision of any other court." *Id.* at 11. Both arguments are wrong.

a. First, Hampton's reference to the statement from the decision below is misleading because it comes from a section of the court of appeals' decision, not challenged here, where the court affirmed the judgment against Hampton's co-plaintiff Cooper on her Section 1981 claim because Cooper never established "a contractual relationship" with Dillard's. Pet. App. 38a. That unremarkable ruling is irrelevant to the question presented because there is no longer any dispute that Hampton had a contractual right to a "free cologne sample." The issue here is whether the court applied the appropriate legal standard to determine if Dillard's had interfered with Hampton's right to "make and enforce" that contractual right. On that issue, the legal standard employed by the court below cannot be reconciled with that of other courts of appeals.

b. At bottom, this case implicates a mature circuit conflict because Hampton could not have prevailed if her case were decided under the standards applied by the Seventh, Fifth and Eighth Circuits. Thus, in *Morris* v. *Office Max, Inc.*, 89 F.3d 411 (7th Cir. 1996), the Seventh Circuit explained that, in the retail setting, a Section 1981 claim is viable only if a customer is denied "admittance" or "service," or "asked to leave the store." *Id.* at 414. Although Hampton argues that the decision below "expressly relied on *Morris*," Opp. 13, both the decision below and Hampton ignore this part of the Seventh Circuit's ruling. That omission is telling because there simply was no evidence that Hampton was denied "admittance" or "service" or was "asked to leave the store." Instead, the court below reasoned that the brief investigative stop resulted in an "interruption," which it equated with "an actual loss of a privilege of her contract." Pet. App. 16a. But Hampton's right "'to a free cologne sample,'" *id.* at 2a, was left unchanged by the brief investigative stop.[3]

Nor can Hampton reconcile the decision below with the Seventh Circuit's subsequent ruling in *Bagley* v. *Ameritech Corp.*, 220 F.3d 518 (7th Cir. 2000). In *Bagley*, the court of appeals held that a plaintiff who was flatly denied service by one employee failed to state a Section 1981 claim because he subsequently could have completed the transaction through another sales representative. *Id.* at 520. The *Bagley* court made clear that the critical issue under Section 1981 is "whether [the defendant] refused to contract with [plaintiff], or [whether] [plaintiff] opted not to contract with [defendant]." *Id.* at 521. Applied here, Hampton could not

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[3] Hampton now argues that she "understood Mr. Wilson as conveying the message that she needed to leave the store." Opp. 5 n.4. That claim is specious. The record makes clear that, after the stop, Hampton "proceeded to the customer service counter," Pet. App. 5a, and, after filing a complaint, more than an hour later, she returned to the store's fragrance counter. Aplt's App. 625.

have recovered because she presented no evidence that she would have been denied her fragrance sample if she had asked for it either immediately after the investigative stop or when she later returned to the fragrance counter. Aplt's App. 625. Indeed, despite the opportunity to exercise her contractual right to the free cologne sample, the district court noted that Hampton failed to request it because it "'wasn't a concern to her.'" Pet App. 90a. Hampton's argument that she had no interest in redeeming the fragrance sample after the brief investigative stop, Opp. 4 n.4, is no different than the claim, rejected in *Bagley*, that the inability to obtain service from a single clerk was sufficient to establish a loss of a contract under Section 1981.

Although Hampton relegates it to a footnote, Opp. 15 n.10, the Fifth Circuit's most recent decision in *Morris* v. *Dillard Department Stores, Inc.*, No. 00-30710, 2001 WL 1650937 (5th Cir. Dec. 26, 2001), also conflicts with the decision below. There, the Fifth Circuit held that a plaintiff who was arrested for shoplifting and banned from the store failed to state a claim under Section 1981 because the plaintiff did not establish any "contractual duty between her and the merchant" that "was in some way thwarted." *Id.* at *5. Here, the brief investigative stop did not "thwart" Hampton's contract right to a free cologne sample. Rather, after the investigative stop, Hampton remained in the store and returned to the fragrance counter but never asked for her "free cologne sample." Pet. App. 90a.

Finally, Hampton contends that *Youngblood* v. *Hy-Vee Food Stores, Inc.*, 266 F.3d 851 (8th Cir. 2001), is distinguishable, arguing that the "outcome in *Youngblood* turned on facts not presented here." Opp. 15. Specifically, Hampton argues that the confiscation of the product in *Youngblood* occurred *after* plaintiff "had already completed his purchase." *Id.* at 16. But here, because Hampton also had completed her purchase of the clothing, under that logic, Dillard's could have confiscated both the clothing and the

fragrance coupon based upon its probable cause of shoplifting without incurring any Section 1981 liability. If confiscation of her purchase would not state a claim under Section 1981, then a brief investigative stop that left Hampton with the clothing she purchased as well as her right to a free cologne sample could not either. In all events, seven-figure liability under Section 1981 should not be made to depend upon the "purely fortuitous" timing of an investigative stop that results in no loss of a plaintiff's contractual right.

c. Hampton's effort to reconcile the decisions of the courts of appeals also fails with respect to rulings, like the one below, that have adopted more sweeping standards for assessing liability under Section 1981. In doing so, the Opposition confirms that the decision below embraced a standard plainly in conflict with the decisions of the Seventh, Fifth and Eighth Circuits.

Specifically, Hampton cites with approval a district court's conclusion that the legal standards applied in *Hall* v. *Pennsylvania State Police*, 570 F.2d 86 (3d Cir. 1978), and those applied in this case "are entirely consistent." Opp. 18 (internal quotation marks omitted). But in *Hall*, the Third Circuit reversed the district court's ruling that the practice of photographing African-American customers as they entered a bank did not violate Section 1981 "because plaintiff did not allege deprivation of any contractually related right because of race." 570 F.2d at 89. Instead, the Third Circuit adopted a broader view, ruling that plaintiff stated a claim under Section 1981 because "upon entering the premises to transact business, his photograph was taken . . . pursuant to a racially based surveillance scheme." *Id.* at 92. But, that holding cannot be reconciled with decisions of other courts of appeals that have ruled that "Section 1981 does not provide a general cause of action for race discrimination." *Youngblood*, 266 F.3d at 855; see also *Morris*, 89 F.3d at 114-15; *Bagley*, 220

F.3d at 521; *Morris*, 2001 WL 1650937, at *5-*6.[4] Hampton's argument that the decision below is "entirely consistent" with *Hall* confirms that the decision below implicates a conflict among the courts of appeals. Just as in *Hall*, the court of appeals justified liability under Section 1981 based not upon the loss of a contract right, but upon "coding and close surveillance" of customers unrelated to any loss of a contractual interest. Pet. App. 35a. Indeed, one district court in the Tenth Circuit already has adopted this view of the decision below, explaining that the *Hampton* court predicated liability under Section 1981 based on conduct "totally removed from the contractual relationship." See *Kelly* v. *Bank Midwest, N.A.*, No. 00-2042-JWL, 2001 WL 1597967, at *15 (D. Kan. Nov. 26, 2001).

Finally, Hampton's argument with respect to *Christian* v. *Wal-Mart Stores, Inc.*, 252 F.3d 862 (6th Cir. 2001), simply misses the mark. Although *Christian* does indeed address the elements of a *prima facie* case of discrimination as Hampton's opposition notes, it makes clear that in the Sixth Circuit, a plaintiff may recover not only if she were "deprived of services while similarly situated persons outside the protected class were not," but also when she actually "received services" but "in a markedly hostile manner and in a manner that a reasonable person would find objectively discriminatory." *Id.* at 874. Thus, the importance of *Christian* is that it does not require—as the Seventh, Fifth, and Eighth Circuits do—the actual loss of a contract right.

As in *Hall* and *Christian*, the court of appeals below conflated the issue of discrimination with the issue of actual

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[4] In her opposition, Hampton simply dismisses the actual holding in *Hall* as merely reflecting "imprecise" language, without ever identifying what language she believes to be imprecise. Opp. 18 n.12. The further argument that *Hall* was decided before the Civil Rights Act of 1991, *id.*, ignores that the 1991 amendments did not alter the "contract" requirement of Section 1981.

loss of a contractual right, and, in doing so, deepened an existing conflict with the Seventh, Fifth and Eighth Circuits.

3. Finally, Hampton contends that certiorari should be denied because, in her view, this case involves "no recurring issue of national importance." Opp. 19. She does not dispute that the uniform interpretation of the Nation's civil rights laws is an important and recurring issue that warrants this Court's review. Instead, her argument is predicated upon the mistaken view that there is no conflict among the courts of appeals and therefore this case "involves [no] unsettled legal issues." *Id.* But that argument fails, as demonstrated above, because there is a conflict among the courts of appeals *and* this case squarely presents it for resolution. Hampton's related argument that further review is not necessary to avoid a "patchwork of procedures and protocols" by retail establishments also is based upon her mistaken view that all of the courts of appeals are aligned. Further review by this Court therefore is warranted to prevent recovery under Section 1981 from depending solely on the fortuity of geography. See Pet. 23-24.

Hampton next argues that the "factual minutiae of this case"—*e.g.*, the "negligible value" of the free fragrance sample, and the "fortuitous timing" of the Wilson's "brief investigative stop," Opp. 19—render this a poor candidate for this Court's review. But these facts merely highlight, as Senior Judge Anderson noted, that Hampton's alleged injuries in this case were not based upon any loss of a contractual interest, but on a "wrongful accusation of shoplifting" for which Section 1981 "does not provide a remedy." Pet. App. 46a. Dillard's does not dispute that Section 1981 protects contractual rights, both large and small, from actual loss, but the "negligible value" of the cologne sample, coupled with the "brief investigative stop," underscore that the conduct about which Hampton complains did not cause her to lose her contractual right to a "free cologne sample"; rather, given the "negligible" value of the cologne sample and the "brief" stop,

respondent merely abandoned a contract right that was no longer "'a concern to her.'" *Id.* at 90a.

Finally, Hampton argues that the existence of objective "probable cause" to make the stop is irrelevant, Opp. 21, as is the issue of whether Officer Wilson had the "subjective intent to interfere with the transaction," *id.* at 22. As to the latter point, respondent argues that reliance upon subjective intent is unprecedented, but this Court already has held that liability under Section 1981 requires a finding of "purposeful discrimination." *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 391 (1982). And, as to the issue of objective probable cause, and the defense that it provides under state law, respondent argues that these matters are irrelevant because "both lower courts recognized" that this "state-law determination at the summary judgment stage was not determinative of the Section 1981 claim." Opp. 21 n.14. But this does not undo this Court's "reluctan[ce] to federalize" matters traditionally covered by state common law. *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 479 (1977). Nor does it answer Dillard's showing that this case "implicates important questions regarding the division of authority between Federal and State government." Pet. 24.

The point is that courts should be reluctant to impose multi-million dollar liability under federal law in circumstances when state law seeks to shield a defendant from all liability. The extraordinary award rendered in this case to remedy a right that "wasn't a concern" to respondent indicates strongly that federal law has been stretched beyond its meaning and has led to an outcome that would have been overturned in three other circuits.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

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